Supreme Court, U.S.
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In The

Supreme Court of the United States

DONNA VIZCAINO and LESLEY STUART,
in their individual capacity,

Petitioners,

vs.

JON R. WAITE, et al.,

Respondents.

BENDICH, STOBAUGH & STRONG, P.C., Class Counsel,

Real-Party-In-Interest.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Resolution of the disagreement among the circuits as to whether this Court's decision in *City of Burlington v. Dague* (hereinafter *Dague*), 505 U.S. 557 (1992) – prohibiting contingent risk enhancement in statutory fee-shifting cases – *also* applies to court-awarded attorneys' fees from common funds.

a) Even if *Dague* does not extend to common fund fee awards, did the Ninth Circuit Court of Appeals violate federal fee jurisprudence in awarding a risk multiplier based on *case-specific risks that arose during the litigation*, rather than evaluating contingent risk for the type of case at the outset of the litigation – the methodology adopted by this Court prior to *Dague* in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley II)*, 483 U.S. 711 (1987).

2. Resolution of a disagreement among the circuits as to whether a federal court, in calculating reasonable attorneys' fees paid from a megafund class action settlement under the percentage-of-the-recovery approach, calculates a reasonable attorneys' fee based upon:

a) An *ex post facto* analysis, focusing on what the reasonable expectation of the plaintiffs' class attorneys would have been at the outset of the litigation *without reference* to the declining percentage principle (as held by the Ninth Circuit in the instant case).

b) An *ex post facto* analysis, focusing on "moderation and a jealous regard to the rights of those who are interested in the fund" as held by this Court in *Trustees v.*

QUESTIONS PRESENTED – Continued

Greenough, 105 U.S. 527, 536-37 (1881), and adopted by the Second Circuit in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 52-53 (2nd Cir. 2000).

c) An *ex ante* analysis, focusing on what a client in the market would have negotiated to pay plaintiffs' class attorneys at the outset of the litigation *with reference* to the declining percentage principle (as held by the Seventh Circuit in *In re Continental Illinois Sec. Litig.* (hereinafter *Continental Illinois*), 962 F.2d 566 (7th Cir. 1992)).

PARTIES TO THE PROCEEDINGS

Petitioners: Donna Vizcaino and Lesley Stuart, individual plaintiff class member/objectors.

Respondents: Donna Vizcaino, Jon R. Waite, Mark Stout, Geoffrey Culbert, Lesley Stuart, Thomas Morgan, Elizabeth Spokoiny, Larry Spokoiny, and the class they represent, nominally. (Donna Vizcaino and Lesley Stuart were representative class plaintiffs who objected to the amount of class counsel's fee request in the district court and before the Ninth Circuit.)

Real-Party-In-Interest: Bendich, Stobaugh & Strong, P.C., class counsel.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Donna Vizcaino and Lesley Stuart respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit's opinion (per Schwarzer, J., joined by Reinhardt, J. and Hawkins, J.), affirming the decision of the District Court for the Western District of Washington, is published as *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002), and is reproduced at App. 1.

The United States District Court for the Western District of Washington at Seattle's Opinion and Order (per Coughenour, J.), is published as *Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d 1299 (W.D. Wash. 2001), and is reproduced at App. 25.

STATEMENT OF JURISDICTION

The United States Supreme Court has jurisdiction to review this case on petition for writ of certiorari pursuant to 28 U.S.C. § 1254(1). The United States Court of Appeals for the Ninth Circuit entered its opinion on May 15, 2002 (App. 1), approving the decision of the United States District Court at Seattle, Washington (App. 25), and denying class members' objections to the $27 million attorneys' fee award to class counsel, which forms the basis of this Petition for Writ of Certiorari. This Petition for Writ of Certiorari is filed within 90 days of the decision

of the United States Court of Appeals for the Ninth Circuit, and is therefore timely under Rule 13.3 of this Court.

STATUTES AND RULES INVOLVED

29 U.S.C. § 1132(g)(1) (ERISA), provides:

> Attorney's fees and costs; awards in actions involving delinquent contributions
>
> (1) In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

Federal Rule of Civil Procedure 23.

INTRODUCTION

This appeal seeks to resolve what can best be described as a chaotic condition within the federal courts of the United States with regard to the factors to be considered when trial courts award reasonable attorneys' fees from common fund recoveries in megafund class action litigation. At stake in this dispute is literally hundreds of millions, if not billions, of dollars in attorneys' fees to be paid to class action lawyers from megafund class action settlements, which would otherwise be used to reimburse class members for their losses.

The new millennium has brought with it an unacknowledged revolution in the fee jurisprudence being employed in several circuits and numerous district courts throughout the United States in the awarding of reasonable attorneys' fees in class actions. For over 100 years, the guiding principle regarding the exercise of judicial

discretion in the awarding of reasonable attorneys' fees from common fund recoveries, announced by this Court in *Trustees v. Greenough,* 105 U.S. at 536-37, has been "moderation and a jealous regard to the rights of those who are interested in the fund."

The new millennium fee jurisprudence, however, has shifted the judiciary's focus from concern for the beneficiaries of the fund to concern about the profits necessary to satisfy the expectations of class action lawyers. (*Note* the Ninth Circuit's reference in the instant case: "[To determine a reasonable attorneys' fee] it may be more appropriate to examine *lawyers' reasonable expectations*. . . . " (App. 11; emphasis added)).

The need for this Court to establish uniform guidelines in megafund class actions is perhaps best exemplified by what promises to be a new era of megafund recoveries. In a mere decade, megafund recoveries, which used to refer to "extraordinarily large" settlements of up to $200 million,[1] now refer not to the size of the recovery *but to the size of the fee itself*! In a mere decade, percentage fee awards of 6 to 10 percent in megafund settlements have ballooned to 28 percent of a megafund recovery, as in the instant case. In the recent *In re Cendant Corp. Litig.*, 264 F.3d 201, 285 (3d Cir. 2001), the Third Circuit appropriately described the district court's award to class counsel

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[1] See *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 351 (N.D. Ga. 1993):

> In megafund cases where extraordinarily large class recoveries of $75-$200 million and more are recovered. . . . [F]ees in the range of 6-10% and even lower are common in this large scale context. (Citation omitted).

of $262 million[2] in attorneys' fees, reflecting multipliers of 24 to 40 as "staggering" and "astonishing," respectively.

A decision by this Court at this time in our nation's history is particularly important. Public confidence in the legal profession is exceedingly low – at or near the bottom in most surveys, not least because too many lawyers are perceived as greedy and as acting in their own self-interest at the expense of their clients.[3]

In addition, it has been observed that courts routinely approve fee requests which substantially overcompensate class action lawyers.[4] As a consequence, class action filings have increased substantially in recent years.[5] The institution

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[2] For an understanding of just how far the judiciary has strayed, note *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719 (5th Cir. 1974) ("[C]ourts ... do not have a mandate ... to make the prevailing counsel rich ... [reasonable fee awards] should not be implemented in a manner to make the private attorney general's position so lucrative as to ridicule the public attorney general.").

[3] In a recent survey of public confidence ... the category of "legal profession/lawyers" placed second lowest, with only 19% indicating that they were "extremely" or "very confident in" the profession. *Public Perceptions of Lawyers; Consumer Research Findings*, ABA Sec. of Litigation, April 2002, at 6. In that same survey, 57% indicated that "lawyers are more concerned with their own self-promotion than their client's best interests." *Id.* at 7. "[T]he greatest number of complaints arise around lawyers' fees.... Consumers say that lawyers charge too much...." *Id.* at 14. A U.S. News & World Report poll found that "56 percent say lawyers use the system to ... enrich themselves." Stephen Budiensky, *How Lawyers Abuse the Law*, U.S. NEWS & WORLD REPORT, Jan. 30, 1995, at 50-51.

[4] *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 287 (7th Cir. 2002) ("[I]nflated attorneys' fees are an endemic problem in class action litigation....").

[5] A survey done by the Federalist Society found that between 1988 and 1998, class action filings increased by 338% in federal courts and more than 1000% in state courts. *See* CLASS ACTION WATCH, *Analysis:*

(Continued on following page)

most capable of unifying the standards used to calculate remuneration awarded by our federal courts in class action litigation is the United States Supreme Court.

Class action attorneys' fee overcompensation is destroying public respect for the legal system.[6] Indeed, one could argue that class action litigation has created more multimillionaires more quickly than any other economic pursuit in American society. It is important that this Court establish uniform guidelines, instructing lower courts with regard to the factors to be considered in awarding multimillion-dollar attorneys' fees from class action megafund recoveries.

STATEMENT OF THE CASE

This class action was filed against Microsoft Corporation on behalf of Microsoft employees referred to as "freelancers," who were denied the benefits which regular employees were provided under Microsoft's various employee benefit programs on the ground that they were independent contractors. (App. 2-3). The complaint alleged claims under Washington State law as well as federal

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Class Action Litigation, A Federalist Society Survey (The Federalist Society for Law & Public Policy Studies, Wash. D.C.), Vol. 1, No. 1 (1999), at 3.

[6] Class Action System Survey, U.S. Chamber of Commerce, Institute for Legal Reform, poll conducted on May 11-12, 2002. *See* www.litigationfairness.org, last consulted on June 27, 2002. In response to the question, who benefits most from the current class action lawsuit system, 45% answered the lawyers who represent the alleged victims, 28% the lawyers who represent the companies being sued, and only 5% answered the people who are part of the class action lawsuits. *Id.* at 4.

ERISA claims. *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997).

The litigation was filed in 1992, *after* an IRS investigation led to an agreement with Microsoft to reclassify so-called permatemp employees as regular employees and withhold appropriate taxes. After protracted court proceedings, settlement discussions began in 1999, and the case was settled in 2001. A Notice of Settlement was sent, advising the class that a common fund of $96,885,000 was created for the class, from which class counsel sought 28 percent of the recovery ($27 million) for attorneys' fees. (App. 3-4).

In response to the Notice, petitioners filed an objection to class counsel's fee request. *After* the objection was filed, class counsel claimed an increased settlement value of $1.1 billion, based upon the reclassification of 3,000 Microsoft freelance employees[7] into W-2 employees. (App. 26 n.1).

The district court overruled petitioners' objections to the excessiveness of the fee request for the following reasons:

1. "[T]he case was extremely risky for class counsel . . . . " (App. 30); "[the class suffered] repeated losses . . . in the district court which, had the decisions stood, would have resulted in no or little[8] recovery for the class." (App. 31).

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[7] Who, it should be noted, paid no attorneys' fee for these reclassification benefits.

[8] The district court failed to acknowledge that a reasonable attorneys' fee was ensured to class counsel under ERISA's fee-shifting statute, regardless of the size of the class's recovery.

2. In light of the extreme risk of the case, the class recovery was extraordinary. (App. 30-31).

3. The representative plaintiffs had entered into retainer agreements with class counsel for 30 percent of the recovery, and thusly 28 percent "was at or below the market rate." (App. 32-33).

4. A multiplier of between 3 and 4 was "wholly justified." (App. 37). The court relied on *In re Cendant*, 109 F. Supp. 2d 285, 292, 302 (D.N.J. 2000) (multiplier of 23 or 32) and 1 Conte, *Attorney Fee Awards* § 2.06 (1993), p. 39 (multiplier of 5-10). (App. 36).

The Ninth Circuit Court of Appeals' panel affirmed the district court's award. The panel held that the district court's consideration of a risk multiplier as part of its lodestar cross-check was proper under *In re Washington Public Power Supply Sys. Sec. Litig.* (hereinafter *WPPSS*), 19 F.3d 1291 (9th Cir. 1994).

> The bar against risk multipliers in statutory fee cases does not apply to common fund cases. *WPPSS*, 19 F.3d at 1299-1300.

(App. 13).

The panel disagreed however with the district court's reliance on a portion of the Seventh Circuit's decision in *Continental Illinois*, 962 F.2d 568:

> We note with respect to this factor [the retainer agreements entered into between class counsel and the named plaintiffs] that *we do not adopt* the Seventh Circuit's approach in percentage fee award cases. . . .

(App. 9; emphasis added). In rejecting the Seventh Circuit approach, the panel held "it may be more appropriate to examine lawyers' reasonable expectations, which are

based on . . . the range of fee awards out of common funds of comparable size."[9] (App. 11).

5. The panel adopted the district court's findings on risk:

> [The district] court found the case to have been extremely risky for class counsel for the reasons just stated. Twice plaintiffs lost in the district court – once on the merits, once on the class definition – and twice counsel succeeded in reviving their case on appeal.

(App. 8).

6. The panel ruled that the IRS settlement with Microsoft *before* this litigation commenced was irrelevant on the issue of risk.[10] (App. 8 n.3).

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[9] Although the Ninth Circuit stated that courts should focus on the reasonable expectations of class counsel, it focused its review of common fund fee awards on the years 1996 through 2001 (App. 11 n.4), although this litigation was filed in 1992.

[10] *But see* Ninth Circuit *en banc* decision, *Vizcaino v. Microsoft Corp.*, 120 F.3d at 1009, 1013:

> In 1989 and 1990 the IRS investigated, and using common law ruled as a matter of law that the workers were employees rather than independent contractors.
>
> . . . .
>
> It is important to recognize that there is no longer any question that the workers were employees of Microsoft, and not independent contractors. The IRS clearly determined that they were. In theory, one could argue that what the IRS said was fine for withholding and FICA purposes, but that is as far as it goes. *However, the IRS made its determination based upon the list of factors which is generally used to decide whether a person is an independent contractor or an employee*. . . . (Emphasis added).

7. The Ninth Circuit rejected the declining percentage principle:

> The district court observed [in *WPPSS*] that "in many cases awards fall outside the 'typical' range and . . . the percentage of an award generally decreases as the amount of the fund increases." *WPPSS*, 19 F.3d at 1297. *We did not adopt this observation as a principle governing fee awards.*

(App. 6; emphasis added).

REASONS FOR GRANTING THE WRIT

I. THERE IS A DISAGREEMENT AMONG THE CIRCUIT COURTS OF APPEAL REGARDING THE APPLICABILITY OF THIS COURT'S DECISION IN *CITY OF BURLINGTON v. DAGUE*, 505 U.S. 557 (1992), TO ATTORNEYS' FEE AWARDS FROM COMMON FUNDS.

A. In *Dague*, this Court prohibited consideration of contingency risk to enhance the lodestar when calculating a court-awarded reasonable attorneys' fee under a fee-shifting statute.

There presently exists a split in the circuits and among various federal district courts as to whether the *Dague* prohibition against enhancing the lodestar for contingency risk for court-awarded reasonable attorneys' fees under fee-shifting statutes also applies when courts award reasonable attorneys' fees from common fund recoveries. Since 1992, when this Court decided *Dague*,

there has been much discussion, but no consensus,[11] in the circuit courts of appeal and among various federal district courts about whether this Court's *Dague* prohibition applies as well to reasonable attorneys' fees awarded from common fund recoveries.

> The Supreme Court has not yet decided whether its decision in *Dague* precluding the use of a multiplier in consideration of risk taken when calculating fees under the lodestar method applies in common fund cases. . . .

Brytus v. Spang & Co., 203 F.3d 238, 243 (3rd Cir. 2000). (Citations omitted).

In the instant case, the Ninth Circuit approved a fee award of 28 percent of the class's settlement fund, as requested by class counsel, which transformed a $7 million lodestar into a $27 million fee award. (App. 4). In doing so, the court approved a contingent risk multiplier of 3.65, relying on *WPPSS*, 19 F.3d at 1299-1301. (App. 13).

As regards the *Dague* dispute on the prohibition of risk multipliers extending to common fund cases, *compare WPPSS*, 19 F.3d at 1299 ("*Dague's* rationale for barring risk multipliers in statutory fee cases does not operate to bar risk multipliers in common fund cases"), and *Florin v. NationsBank of Georgia* (hereinafter *Florin*), 34 F.3d 560, 564 (7th Cir. 1994) ("we conclude that the holding in *Dague* should not extend to this case . . . . Common fund principles properly control a case which is initiated under

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[11] For a general discussion of conflicting circuit and district court interpretations of *Dague*, *see* Alan Hirsh and Diane Sheehey, *Awarding Attorneys' Fees and Managing Fee Litigation* 49, 70-71 (Fed. Judicial Ctr. 1994); *Lake v. First Nationwide Bank*, 900 F. Supp. 726, 736 (E.D. Pa. 1995).

a statute with a fee-shifting provision, but is settled with the creation of a common fund"),[12] *with In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.* (hereinafter *GM Pick-Up)*, 55 F.3d 768, 822 (3d Cir. 1995) ("to the extent that the district court relied on the lodestar method, it erred by applying a multiplier . . . [t]he Supreme Court . . . has rejected the use of multipliers to enhance the lodestar's hourly rate amount") (applied to de facto common fund); and *In re Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 619 (1st Cir. 1992) (J. Lay, concurring) ("I can discern no logical distinction between an equitable fund case and a fee-shifting case that would cause these [*Dague's*] reasons to be worthwhile in [fee-shifting but not in] an equitable fund case.").

Various federal district courts have weighed in on the issue. *See, e.g., Nensel v. People's Heritage Financial Group*, 815 F. Supp. 26, 30 (D. Me. 1993) (holding that *Dague's* proscription of the use of risk multipliers applies to common fund cases); *Weinberger v. Great Northern Nekoosa Corp.*, 801 F. Supp. 804, 825 n.59 (D. Me. 1992) (same); *In re Bolar Pharmaceutical Co. Sec. Litig.*, 800 F. Supp. 1091, 1095 (E.D.N.Y. 1992) ("ban on fee enhancement for contingency in statutory fee-shifting cases extends to equitable fund cases"). *But see Gottlieb v. Wiles*, 150 F.R.D. 174, 184 n.6 (D. Colo. 1993), for contrary analysis.

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[12] However, the Seventh Circuit, although allowing risk enhancement, "suggested . . . a sensible ceiling of double the lodestar." *Florin*, 34 F.3d at 565.

Petitioners believe that the Ninth Circuit interpretation of *Dague* is incorrect. Numerous courts and authorities have found that *all* of the concerns which this Court expressed in *Dague* as reasons to prohibit consideration of contingency risk in fee-shifting cases, apply as well to fee calculations in common fund cases – and some apply to common funds with even greater force!

Note:

Nensel v. Peoples Heritage Financial Group, 815 F. Supp. at 28:

> Having once again carefully studied the reasons put forth in the *Dague* opinion as to why a multiplier-based enhancement is not warranted, the Court can see little, if any, basis to distinguish in the application of the holding in *Dague* between fee-shifting and common-fund cases.
>
> . . . .
>
> Enhancement for contingency in common-fund cases will *also* have the effect of compensating (on the basis of averages) counsel for services in cases where they have not prevailed and will encourage the bringing of weak and unfounded class action suits.

Trief v. Dunn & Bradstreet Corp., 840 F. Supp. 277, 284-85 (S.D.N.Y. 1993):

> The language of the [*Dague*] opinion, however, strongly suggests that the court's holding is applicable to common fund cases. . . . *Moreover, the City of Burlington court's reasoning is directly applicable to class action suits brought pursuant to Rule 23.* Each consideration enunciated by the *City of Burlington* court declining to permit enhancement of the lodestar is equally relevant to the question of whether the lodestar should be enhanced in this case. . . . [I]ts applicability is

> not limited to the context of federal fee-shifting statutes. (Citation omitted; emphasis added).

In re Prudential Ins. Co., 962 F. Supp. 572, 581 n.24 (D.N.J. 1997):

> The Supreme Court, however, held [in *Dague*] that risk enhancements were inappropriate in fee-shifting cases. While the Court did not address whether risk enhancements survive in common fund cases, *the Court's reasoning for excluding risk enhancements in fee-shifting cases applies equally to common fund cases*. (Emphasis added).

Weinberger v. Great Northern Nekoosa Corp., 801 F. Supp. at 825 n.59:

> Nonetheless, the *Dague* court's policy rationales in denying a contingency-based multiplier seems to be equally applicable here.

Dague proscribed use of contingent risk multipliers to enhance the lodestar for the following reasons:

1. Enhancement for contingency risk "would likely duplicate . . . factors already subsumed in the lodestar." *Dague*, 505 U.S. at 562.

2. Enhancement for contingency risk "would encourage meritorious claims to be brought, but only at the social cost of indiscriminately encouraging nonmeritorious claims to be brought as well. We think that an unlikely objective of the 'reasonable fees' provisions." *Dague*, 505 U.S. at 563.

3. Enhancement for contingency risk to attempt "to mimic the intricacies of the fee-paying market in every respect [is neither necessary nor even possible]." *Dague*, 505 U.S. at 566-67.

4. Enhancement for contingency risk, under the conditions set forth in *Delaware Valley II,* 483 U.S. 711, cannot "be intelligibly applied." *Dague*, 505 U.S. at 563.

5. Enhancement for contingency risk requires that a defendant "would in effect pay for the attorney's time (or anticipated time) in cases where his client does not prevail." *Dague*, 505 U.S. at 565.

6. Enhancement for contingency risk "would make the setting of fees more complex and arbitrary, hence more unpredictable. . . . " *Dague*, 505 U.S. at 566.

Each of these factors applies equally to judicial concerns in class action common fund recoveries. The courts which have held *Dague* does not apply to common fund fee calculations focus on only one of the reasons discussed by this Court in *Dague*, to wit: the impropriety of requiring a defendant to pay a higher fee based on risk.

> The concerns that drove the Court to reject contingency enhancements in the statutory fee context apply with much less force in common fund cases. Unlike statutory fee-shifting cases where the winner's attorneys' fees are paid by the losing party, attorneys' fees in common fund cases are not paid by the losing defendant, but by members of the plaintiff class.

WPPSS, 19 F.3d at 1300. *Accord, Florin,* 34 F.3d at 564 ("Unlike in fee-shifting cases, the fee award in a common fund case is ultimately charged against the plaintiffs' fund, rather than directly against the defendant.").

Though in fee-shifting cases the defendant pays the reasonable fee, and, in common fund cases, the plaintiff pays the reasonable fee, there is no logical distinction between these types of public interest litigation which

would make the reason for *Dague's* prohibition of risk enhancement inapplicable in common fund cases.

Neither *WPPSS* nor *Florin* consider that in *Dague* the concern which this Court was addressing was the incentivizing of attorneys to file marginally meritorious lawsuits.

Furthermore, allowing two radically different fee outcomes, based upon whether class counsel seek attorneys' fees under a fee-shifting statute as opposed to from a common fund, has numerous additional deleterious effects.

(a) It frustrates the intent of Congress in establishing fee-shifting statutes.

In establishing fee-shifting statutes, Congress sought to encourage lawyers to undertake specific types of litigation which it deemed to be socially beneficial. However, to pay lawyers more (indeed, nearly quadrupling their fees for identical work), when reasonable attorneys' fees are paid from a common fund recovery as opposed to fees paid by a defendant under a fee-shifting provision, serves as a disincentive to lawyers to bring cases when large damage recoveries are unavailable.

> This focus on damages would contradict Congress's purpose in providing for fee-shifting in these cases, which was "to encourage successful civil rights litigation, not to create a special incentive to prove damages and shortchange efforts to seek effective injunctive and declaratory relief." Indeed, since fees paid out of a common fund are only available in multi-plaintiff actions, the widespread use of common-fund recoveries as a source of fees for lawyers in Title VII or civil rights cases would not only skew the incentives of plaintiffs' lawyers toward damages rather than

> equitable remedies, but also toward class actions rather than suits by individuals.

Evans v. City of Evanston, 941 F.2d 473, 479 (7th Cir. 1991). (Citation omitted).

It was specifically for the purpose of encouraging lawyers to bring cases under circumstances where large damage recoveries were not available that fee shifting was established. It simply makes no sense for courts to pay lawyers significantly *lower* attorneys' fees for prosecuting cases which Congress sought to encourage and deemed to be of particular social benefit, and to pay higher attorneys' fees to lawyers who bring cases which Congress did not feel of sufficient public interest to warrant the insurance of a reasonable attorneys' fee.

> Because these cases are not presumed to serve the public interest (as evidenced by the lack of a fee statute), there is no social policy reason that demands an adequate fee.

GM Pick-Up, 55 F.3d at 821.

Congressional intent can only be achieved if this Court adopts a uniform fee methodology without reference to whether or not litigation creates a common fund on behalf of prevailing plaintiffs. In point of fact, both the class action mechanism and fee-shifting provisions were instituted by Congress to encourage public interest litigation. If a court is asked to determine a reasonable fee, there is no justification of having a radically different fee-enriching experience for lawyers where both types of litigation were created by Congress to serve the public good. To paraphrase Gertrude Stein, a reasonable fee is a reasonable fee is a reasonable fee.

> [W]e are of the view that where the court is called upon to set a fair and reasonable fee the

> same general method should be used regardless of the type of case involved.

Brewer v. Southern Union Co., 607 F. Supp. 1511, 1521 (D. Colo. 1984).

(b) To fail to extend the Dague prohibition against risk multipliers to common fund recoveries creates a financial conflict of interest for class action lawyers.

It compromises the lawyers' fiduciary responsibility to maximize the class's recovery and incentivizes counsel to place their own financial interests ahead of the interests of the class.

Class counsel have a fiduciary responsibility to class members in class actions – "attorneys . . . seeking to represent the class assume fiduciary responsibilities to the class. . . . " NEWBERG ON CLASS ACTIONS (3d ed.), Ch. 15, § 1503, *Relationship Between Class Representative or Counsel and Absent Class Members.*

> The responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel.

Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1465 (9th Cir. 1995).

The conflict of interest issue in litigation commenced under fee-shifting statutes and settled with the creation of a common fund is clear:

> In the usual common fund case, the question of whether the fund was created through a judgment or a settlement is irrelevant to the method by which the amount of compensation is determined.

> In a case such as this one, however, had plaintiffs prevailed at trial, it is entirely possible that defendants, rather than the common fund, would have been liable for attorney's fees under ERISA, 29 U.S.C.A. § 1132(g)(1). For the court to award plaintiffs' counsel a percentage of the settlement when he might only have been entitled to an hourly – and therefore possibly lower – fee had he obtained a favorable judgment, *would raise the specter of a significant conflict of interest between counsel and the absent class members* in the negotiation of such a settlement.

Bowen v. South Trust, 760 F. Supp. 889, 896 (M.D. Ala. 1991). (Footnote omitted).

The court, in *Brytus v. Spang & Co.*, noted the potential problem of the disparity of different methods of calculating reasonable attorneys' fees under the aforementioned circumstance.

> Of course, there remains the possibility that in some cases counsel for a class of plaintiffs may receive a higher fee award upon settlement than they would have received had the case proceeded to judgment.

Brytus v. Spang & Co., 203 F.3d at 247.

This Court, in *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 621 (1997), recognized the problem where class counsel were "confined to settlement negotiations [and] could not use the threat of litigation to press for a better settlement." In such circumstances, class counsel were compromised in their ability to represent the class's interest. As observed by class counsel in *Brytus*, attorneys are compromised as long as *Dague* does not extend to common fund recoveries because counsel risk a lower court-awarded attorneys' fee by pressing the class's claim to trial.

Class counsel should never be placed in the position of being able to engineer higher compensation for themselves by settling cases on terms which optimize their own recovery when all their thoughts should be directed towards maximizing the class's recovery. Allowing lawyers' self-interest to intrude into the lawyers' obligation to maximize the class's recovery will only further weaken public confidence in the legal profession.

On this point, *see McLendon v. Continental Group, Inc.*, 872 F. Supp. 142 (D.N.J. 1994), where Special Master Yale Law School Professor George L. Priest found *Dague's* prohibition against risk multipliers applicable to common fund recoveries, based on class counsel's conflict of interest.

> The Master concludes that the *Dague* restriction must apply to any common fund case that started as a fee-shifting case. He reasons that since *Dague* clearly prohibits any risk enhancement of lodestar amounts in statutory fee cases, then allowing such enhancement in such cases that settle for a lump sum would improperly encourage plaintiff attorneys to settle for lump sums in hopes of obtaining a risk enhancement that would not otherwise be available. Thus, the Master predicts that the Supreme Court would prohibit risk enhancement of the lodestar amount even if the award came from a common fund derived from a fee-shifting case . . . . In essence, the Master contends that if different rules apply to attorneys' fees once a fee-shifting case settles, then a conflict of interest inevitably would arise between plaintiffs and their attorneys as to the course of the litigation.

McLendon, 872 F. Supp. at 154. (Footnote and citation omitted) (highlighting the controversy over these issues, Judge Sarokin overruled the Special Master's finding).

(c) The risk of encouraging unmeritorious litigation is far greater in the class action context than in traditional litigation.

Class actions, by their very nature, have a significantly greater potential to result in settlements irrespective of the merits of the case than any other form of litigation.

> First, the class certification turns a $200,000 dispute . . . into a $200 million dispute. Such a claim puts a bet-your-company decision to Bridgeport's managers and may induce a substantial settlement, *even if the customers' position is weak.*

Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 675 (7th Cir. 2001). (Emphasis added).

As noted by Judge Posner in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995), class actions produce what have been described as "blackmail" settlements, i.e., settlements which rational business judgment requires defendants settle, "even if they have no legal liability."

> Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action "blackmail settlements."

Id. at 1298.

One of the unintended consequences of the class action mechanism places a much heavier burden on defendants to settle questionable litigation.

> But, where damages are a substantial issue, the combination of the expansion of liability, the uncertainty of the process, and the way our class action procedures are devised, almost always leads to automatic settlement or guaranteed settlement once a class action is certified.

George L. Priest, *Economics of Class Actions*, 9 KAN. J. L. & PUB. POL'Y 481, 482 (No. 3, Spring 2000).

B. If *Dague's* prohibition does not extend to fees awarded from common fund recoveries, then risk multipliers should be based upon the risk methodology established by this Court in *Delaware Valley II*, rather than case-specific risks which arise during the litigation, as held by the Ninth Circuit in the instant case.

Prior to this Court's decision in *Dague*, contingent risk multipliers were calculated under the methodology set out by Justice O'Connor in *Delaware Valley II*. That decision specifically holds that contingency risk should not be based "on [an] assessment of legal risk and risks unique to the case." (*Delaware Valley II*, 483 U.S. at 731). The Ninth Circuit, in the instant case, determined the level of contingency risk based upon case-specific risks which arose during the litigation.

> Twice plaintiff lost in the district court – once on the merits, once on the class definition – and twice counsel succeeded in reviving their case on appeal.

(App. 8; footnote omitted). It approved the district court's awarding of a 3.65 risk multiplier based upon factors such as "Microsoft fought this case vigorously for years" (App. 30), and "there were no controlling precedents concerning [plaintiff's] claims" (App. 30).

However, these two factors were directly disapproved of as considerations for enhancing the lodestar in *Delaware Valley II,* in which this Court noted that the "potential for protracted litigation," and the "stubbornness of the defendants," and the "novelty and difficulty of issues" were not relevant factors. *Delaware Valley II,* 483 U.S. at 731, 734.

As this Court stated in *Dague*, "to award a contingency enhancement under a fee-shifting statute would, in effect, pay for attorneys' time (or anticipated time) in cases where their client does not prevail." (*Dague*, 505 U.S. at 565). This policy rationale is directly contradicted by the Ninth Circuit's approval of contingent risk multipliers in *WPPSS*.

> In common fund cases "attorneys whose compensation depends on their winning the case must make up in compensation in the cases they win for the lack of compensation in the cases they lose." [*WPPSS*] at 1300-01.

(App. 13).

The Ninth Circuit holding is also contrary to the risk analysis methodology adopted by the Seventh Circuit. The *Florin* court noted "a court must assess the riskiness of the litigation by measuring the probability of the success of this type of case *at the outset of the litigation*." *Florin*, 34 F.3d at 565 (emphasis added). The *Florin* court adopted a maximum risk multiplier of two. *Id.*

The risk multiplier of 3.65, approved by the Ninth Circuit, means that the litigation had a roughly one in four chance of success.

> "[T]he attorney bears a contingent risk of non-payment that is the inverse of the case's prospects of success: if his client has an 80% chance of winning, the attorney's contingent risk is 20%."

Dague, 505 U.S. at 561 and discussion at 563.

This calculation is consistent with the Ninth Circuit's characterization of this litigation as "extremely risky." The awarding of an extreme risk multiplier is totally inconsistent with the judiciary's responsibility to ensure that our courts do not invite high-risk litigation with the lure of higher fees, as the uncertainty of prevailing on the merits increases.

II. THERE IS A DISAGREEMENT AMONG THE CIRCUIT COURTS OF APPEAL REGARDING THE NATURE OF THE *EX POST FACTO OR EX ANTE* ANALYSIS WHICH IS TO BE USED FOR CALCULATING A PERCENTAGE-OF-THE-RECOVERY FEE AWARD IN MEGAFUND CLASS ACTION SETTLEMENTS.

A. This Court is asked to create a uniform rule that the calculation of reasonable attorneys' fees paid from class action common funds focuses on the class member/beneficiaries' interest in their recovery, not on the lawyers' need for profit incentives.

As noted by the Second Circuit in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469 (2d Cir. 1974), this Court, over 100 years ago, directed district courts in the

awarding of reasonable attorneys' fees from common funds, as follows:

> [C]ourts must always heed the admonition of the Supreme Court in *Trustees v. Greenough, supra,* when it advised that fee awards under the equitable fund doctrine were proper only 'if made with moderation and a jealous regard to the rights of those who are interested in the fund.' 105 U.S. at 536.

This policy, which has guided American courts since the inception of the common fund doctrine, has been rejected by the Ninth Circuit in its adoption of a modified Seventh Circuit market approach. As the Seventh Circuit acknowledged, in adopting the market approach:

> The second circuit has criticized this court's market-mimicking approach on the ground that one "cannot know precisely what fees common fund plaintiffs in an efficient market for legal services would agree to." *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 53 (2d Cir. 2000). "Instead," that court "adhere[s] to [the] practice that a fee award should be assessed based on scrutiny of the unique circumstances of each case, and 'a jealous regard to the rights of those who are interested in the fund.'"

In re Synthroid Marketing Litig., 264 F.3d 712, 719 (7th Cir. 2001).

However, a "market approach" is inconsistent with this Court's decision in *Trustees v. Greenough*, 105 U.S. 527, because it focuses consideration of a reasonable fee based upon a hypothetical market negotiation between a class action lawyer and his or her clients.

> On remand, the district court must estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers, had

> bargaining occurred at the outset of the case (that is, when the risk of law still existed).

In re Synthroid Marketing Litig., 264 F.3d at 718.

Moreover, the methodology employed by the Seventh Circuit contradicts the holding of the Third Circuit Court with regard to the relevancy of private fee agreements in the awarding of reasonable attorneys' fees in megafund class actions.

> While such private fee arrangements might be appropriate in smaller class actions or litigation involving individual plaintiffs, we do not believe they provide much guidance in cases involving the aggregation of over 8 million plaintiffs and a potential recovery exceeding $1 billion.

In re Prudential Ins. Co. America Sales Litig., 148 F.3d 283, 340 (3d Cir. 1998).

An important reason why hypothetical fee agreements negotiated between plaintiffs and class action lawyers should not be relied upon in the class action context is the manner in which class action lawsuits are instituted by class action lawyers.

> Because class members usually don't go shopping for the lawyers, or indeed do anything else in the case other than agree to lend their names to the litigation, a court must be mindful to safeguard the public interest.

In re Wells Fargo Sec. Litig., 156 F.R.D. 223 (N.D. Cal. 1994).

The Ninth Circuit, as demonstrated in the instant case, has accepted the market approach concept, although it has rejected the Seventh Circuit reliance on fee agreements negotiated between plaintiffs and their counsel:

> We note with respect to this factor [the retainer agreements entered into between class counsel

> and the named plaintiffs] that *we do not adopt* the Seventh Circuit's approach in percentage fee award cases.

(App. 9, 11 (footnote omitted)), and has substituted in its place the determination of court-awarded fees based upon the reasonable expectations of the lawyer handling the case.

> [I]t may be more appropriate to examine the lawyers' reasonable expectations, which are based on . . . the range of fee awards out of common funds of comparable size."

(App. 11).

Moreover, there are at least two problems with the Ninth Circuit approach. In the first place, in seeking to determine the lawyers' reasonable expectations, the court produced a survey of fee awards from common funds from the period 1996 through 2001. (App. 11 n.4 and Appendix). However, the instant lawsuit was filed in 1992. It is difficult to understand how lawyers commencing litigation in 1992 could legitimately have had a reasonable expectation about their fee, based upon awards which did not exist until between four and seven years *after* they undertook the representation.

The second problem with the Ninth Circuit approach is that it fails to recognize the realities of the modern practice of law in the new millennium.

> During the 1980s and 90s, the legal profession has become more of a business and less of a profession. . . . Financial success has become the dominant value for many lawyers. Many lawyers and firms have subordinated . . . fiduciary obligations to clients . . . to income maximization. *Preoccupation with profit is most intense in some of the most respected law firms in the United States.*

Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205, 219 (No. 2, Winter 1999). (Emphasis added).

Professor John Coffee agrees:

> [W]here plaintiffs' attorney was once seen as a public . . . [spirited] private attorney general, increasingly the more standard depiction is as a *profit-seeking entrepreneur capable of opportunistic actions. . . .*

John C. Coffee, *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 371 (2000). (Emphasis added).

The Ninth Circuit fee methodology, which suggests that class counsel's fee be based upon the "reasonable" fee expectations of class counsel, is unrealistic in the context of contemporary litigation practice.

B. Whether or not this Court chooses to jettison the *Trustees v. Greenough* (105 U.S. at 536-37) doctrine of "moderation and a jealous regard for the rights of those interested in the fund," it should nonetheless reject the Ninth Circuit's refusal to adopt the "declining percentage principle."

> The district court observed [in *WPPSS, supra*] that "in many cases awards fall outside the 'typical' range and . . . the percentage of an award generally decreases as the amount of the fund increases." *WPPSS*, 19 F.3d at 1297. *We did not adopt this observation as a principle governing fee awards.*

(App. 6; emphasis added).

The declining percentage principle was first enunciated in the Report of the Third Circuit Task Force, *Court Awarded Attorneys' Fees*, 108 F.R.D. 237 (1985):

> In most cases it [the fee arrived at] will involve a sliding scale dependent upon the ultimate recovery, the expectation being that . . . *the percentage will decrease as the size of the fund increases.*"

Id. at 256. (Emphasis added).

Petitioners believe that the Ninth Circuit's refusal to adopt the declining percentage principle is inconsistent with this Court's recent opinion in *Gisbrecht v. Barnhart*, 2002 WL 1049193, 122 S.Ct. 1817 (2002), wherein the Court recognized that: "If the benefits are large in comparison to the amount of time counsel spent on the case, a downward adjustment is similarly in order." (*Id.*, Opinion 5/28/02, at 4).

What is more, the Ninth Circuit's refusal to adopt the declining percentage principle conflicts with the Seventh Circuit's fee methodology which, although adopting a purported market approach, retains the declining percentage principle:

> We know that in personal-injury suits the usual range for contingent fees is between 33 and 50 percent, but we also know that in large commercial litigation with prospects of multimillion dollar recoveries the percentage frequently is tapered – IT MIGHT BE 33 PERCENT OF THE FIRST MILLION, 25 PERCENT OF THE NEXT MILLION, *AND SO ON DOWN.*

In re Continental Illinois Sec. Litig., 962 F.2d at 572 (Posner, J.). (Emphasis added); *see* App. 32.

The Ninth Circuit approach also conflicts with the Third Circuit approach to megafund recoveries.

> In considering the size of the expected recovery . . . the district court observed that "percentage awards generally decrease as the amount of the recovery increases. . . . " We agree. With recoveries exceeding $100 million . . . fee percentages range from 4.1 to 17.92 percent.

In re Prudential Ins. Co. America Sales Litig., 148 F.3d at 339.

The split in approaches to awarding reasonable attorneys' fees in megafund cases has been accompanied by what amounts to different sets of factual data regarding fee awards in megafund cases. As noted by U.S. District Court Judge Elaine E. Bucklo in *In re Synthroid Marketing Litigation*:

> I noted that there are few so-called "megafund" cases with settlements of over $100 million, but that in such cases, courts have been reluctant to award class counsel attorneys' fees in the range of 22% or 29%, *see* [MANUEL FOR COMPLEX LITIGATION 3d, § 24.121] at 684-85.
>
> . . . .
>
> Evidence . . . in the form of a research memorandum by Professor John Coffee of Columbia Law School, indicates that more recently, courts have been more willing to allow attorneys' fees in the 29% range in "megafund" cases.

In re Synthroid Marketing Litig., 201 F. Supp. 2d 861, 864, 865 n.1 (N.D. Ill. 2002).

Judge Bucklo's argument that Professor Coffee's research "suggests that courts routinely overcompensate attorneys in class actions of all sorts" (*id.* at 872 n.6) is consistent with the observations of the Second Circuit Court of Appeals in *Goldberger v. Integrated Resources, Inc.*:

> [C]oncern for [moderation] is amplified by our nagging suspicion that attorneys in these cases are routinely overcompensated for such things as contingency risk.

Goldberger v. Integrated Resources, Inc., 209 F.3d at 57.

CONCLUSION

Petitioners believe that the many conflicting fee methodologies which have been adopted by various federal circuit and district courts have created what amounts to fee jurisprudence chaos. Because of the "staggering" sums of money now being sought by class action lawyers, uniform standards of fee jurisprudence are necessary. This case provides an opportunity for the Supreme Court to correct the confused state of federal fee jurisprudence in megafund class actions.

Respectfully submitted,

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Donna Vizcaino; Jon R. Waite, Mark Stout; Geoffrey Culbert; Lesley Stuart; Thomas Morgan; Elizabeth Spokoiny; Larry Spokoiny, Plaintiffs-Appellees,

v.

MICROSOFT CORPORATION, and its health and benefits plans: Health Benefit Plan, Life Insurance Plan, Short-Term and Long-Term Disability Plans, and Savings (401K) Plan, Defendant.

Donna Vizcaino; Lesley Stuart,
Plaintiffs-Appellants,

and

Donna Vizcaino; Jon R. Waite; Mark Stout; Geoffrey Culbert; Thomas Morgan; Elizabeth Spokoiny; Larry Spokoiny; Lesley Stuart, Plaintiffs-Appellees,

v.

Microsoft Corporation, and its health and benefits plans: Health Benefit Plan, Life Insurance Plan, Short-Term and Long-Term Disability Plans, and Savings (401K) Plan, Defendant.

Nos. 01-35494, 01-35644.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 20, 2002.

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Before REINHARDT and HAWKINS, Circuit Judges, and SCHWARZER,* Senior District Judge.

OPINION

SCHWARZER, Senior District Judge.

Once more we must address an issue arising out of the protracted litigation between Microsoft Corporation and its freelance workers, this time to decide whether the district court abused its discretion in the amount of attorneys' fees it awarded to class counsel.

FACTUAL AND PROCEDURAL BACKGROUND

Beginning in 1987, Microsoft supplemented its work-force with workers known as "freelancers," who agreed in writing that they would not be eligible for Microsoft employee benefits, including the Employee Stock Purchase Plan ("ESPP") and the Savings Plus Plan ("SPP"). In 1992,

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* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

eight former freelancers brought this action challenging Microsoft's refusal to provide them with benefits under these plans. The district court certified a class and dismissed the action. After a panel of this court reversed the dismissal of both the ESPP and SPP claims,[1] the full court voted to rehear the case en banc. The en banc court also reversed the district court's dismissal of the ESPP claim, but held that plaintiffs had not exhausted their administrative remedies for the SPP claim, and remanded that claim to the plan administrator for adjudication in the first instance. *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir.1997). On remand, the district court substantially narrowed the class. *Vizcaino v. Microsoft Corp.*, 21 Employee Benefits Cas. 2821(BNA), 1998 WL 122084 (W.D.Wash.1998). This court then granted mandamus, held the class to include persons who had worked for Microsoft after 1990, and identified factors to be applied in determining individual eligibility. *Vizcaino v. United States Dist. Ct. for the W. Dist. of Wash.*, 173 F.3d 713 (9th Cir.1999). Settlement negotiations followed, and after two years the parties submitted a proposed settlement of all claims to the district court. The agreement required Microsoft to deposit $96,885,000 into a settlement fund, to be distributed to the class members after payment of incentive awards, costs, and fees. Microsoft also changed its staffing and worker classification practices, resulting in the hiring of over 3000 class members as W-2 employees entitled to participate in employee benefit plans and programs.

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[1] *Vizcaino v. Microsoft Corporation*, 97 F.3d 1187 (9th Cir.1996).

After receiving written submissions and hearing argument, the district court approved the settlement on extensive findings of fact and conclusions of law. It then received class counsel's application for an award of attorneys' fees of $27,127,800 (28% of the cash settlement fund). Two members of the class objected. After considering the submissions of counsel and the objectors, and hearing argument on the fee award, the court entered an order approving class counsel's fee request. *Vizcaino v. Microsoft Corp.*, 142 F.Supp.2d 1299 (W.D.Wa.2001). Before us now is the objectors' appeal from that order. We review for abuse of discretion. *Class Plaintiffs v. Jaffe & Schlesinger, P.A.*, 19 F.3d 1306, 1308 (9th Cir.1994).

DISCUSSION

Objectors challenge the district court's order on three grounds: First, and principally, that in awarding a fee of 28% of the settlement fund, it ignored the so-called increase-decrease rule; second, that in applying a lodestar cross-check, it used an improper methodology; and third, that in denying objectors' fee request without explanation, it abused its discretion. We address each contention in turn.

I. THE DISTRICT COURT'S PERCENTAGE CALCULATION

The district court found that the settlement fund was the product of the successful claim for benefits under Microsoft's ESPP.[2] Because Washington law governed the

[2] The SPP claim, which arose under the Employees Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a), was referred to the

(Continued on following page)

claim, it also governs the award of fees. *Mangold v. Calif. Pub. Utils. Comm'n,* 67 F.3d 1470, 1478 (9th Cir.1995). Under Washington law, the percentage-of-recovery approach is used in calculating fees in common fund cases. *Bowles v. Dep't of Ret. Sys.,* 121 Wash.2d 52, 72, 847 P.2d 440 (1993) (holding that in a common fund case, "the size of the recovery constitutes a suitable measure of the attorneys' performance"). The district court followed the Washington practice of looking to federal law for guidance in this area, and we will do the same. *See id.* Under Ninth Circuit law, the district court has discretion in common fund cases to choose either the percentage-of-the-fund or the lodestar method. *In re Wash. Pub. Power Supply Sys. Sec. Litig.,* 19 F.3d 1291, 1295-96 (9th Cir.1994) (*"WPPSS"*). Objectors do not challenge the district court's choice of the percentage method, only its application.

The district court based its percentage award on *Bowles,* which states that "[i]n common fund cases, the 'benchmark' award is 25 percent of the recovery obtained," with 20-30% as the usual range. *Bowles,* 121 Wash.2d at 72-73, 847 P.2d 440. Ninth Circuit cases echo this approach. *Paul, Johnson, Alston & Hunt v. Graulty,* 886 F.2d 268, 272 (9th Cir.1989). Objectors contend that the award is nevertheless excessive, arguing that the court erred in failing to take into account that this is a megafund case to which it should have applied what objectors call the increase-decrease rule. They rely principally on *WPPSS,* in

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SPP administrator and subsequently to the plan's administrative committee, which denied the appeal. The issue was ready for judicial review by the district court but had not been decided when the settlement of all claims was reached.

which the district court chose the lodestar rather than the percentage method in awarding fees from a $687 million settlement fund. The district court observed that "in many cases awards fall outside the 'typical' range and . . . the percentage of an award generally decreases as the amount of the fund increases." *WPPSS,* 19 F.3d at 1297. We did not adopt this observation as a principle governing fee awards. Rather, we merely noted that in cases of that magnitude, fund size is one relevant circumstance to which courts must refer, stating:

> We agree with the district court that there is no necessary correlation between any particular percentage and a reasonable fee. With a fund this large, picking a percentage without reference to all the circumstances of the case, including the size of the fund, would be like picking a number out of the air . . . . Because a court must consider the fund's size in light of the circumstances of the particular case, we agree with the district court that the 25 percent "benchmark" is of little assistance in a case such as this.

Id. We concluded that the district court had acted within its discretion in considering the size of the fund in adopting the lodestar method.

The 25% benchmark rate, although a starting point for analysis, may be inappropriate in some cases. Selection of the benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case. As we said in *WPPSS,* in passing on post- settlement fee applications, "courts cannot rationally apply any particular percentage – whether 13.6 percent, 25 percent or any other number – in the abstract, without reference to all the circumstances of the case." *Id.* at 1298; *see also*

Camden I Condominium Ass'n, Inc. v. Dunkle, 946 F.2d 768, 775 (11th Cir.1991) (noting with approval that district courts are increasingly "'supporting their percentage awards with particular findings showing factors considered.'" (quoting HERBERT NEWBERG, ATTORNEY FEE AWARDS § 2.07 (1st ed.1986))). Objectors' argument that the district court erred in not fixing a lower percentage, such as one between 6% and 10%, flies in the face of this reasoning. The question is not whether the district court should have applied some other percentage, but whether in arriving at its percentage it considered all the circumstances of the case and reached a reasonable percentage. We now turn to the court's examination of those circumstances.

First, the court found that counsel "achieved exceptional results for the class." *Vizcaino,* 142 F.Supp.2d at 1303. The court found that counsel pursued this case in the absence of supporting precedents, in the face of agreements signed by the class members forsaking benefits – a fact that led four judges of this court to dissent from the panel and en banc opinions – and against Microsoft's vigorous opposition throughout the litigation. Exceptional results are a relevant circumstance. *See Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1377 (9th Cir.1993) (considering counsel's "expert handling of the case"); *Six (6) Mexican Workers v. Ariz. Citrus Growers,* 904 F.2d 1301, 1311 (9th Cir.1990) (noting plaintiffs' "substantial success"); *In re Prudential Ins. Co. Sales Practices Litig.,* 148 F.3d 283, 339 (3d Cir.1998) (observing that "results achieved were 'nothing short of remarkable'" (quoting *In re Prudential Ins. Co. Sales Practices Litig.,* 962 F.Supp. 572, 585-86 (D.N.J.1997))).

Second, the court found the case to have been extremely risky for class counsel for the reasons just stated. Twice plaintiffs lost in the district court – once on the merits, once on the class definition – and twice counsel succeeded in reviving their case on appeal.[3] Risk is a relevant circumstance. *See In re Pac. Enter. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir.1995) (holding fees justified "because of the complexity of the issues and the risks"); *Bebchick v. Wash. Metro. Area Transit Comm'n*, 805 F.2d 396, 408 (D.C.Cir.1986) (considering counsel's repeated successes in overturning adverse determinations) (calculating lodestar); *cf. WPPSS*, 19 F.3d at 1302 (finding district court's failure to apply multiplier to lodestar calculation was abuse of discretion where case was "fraught with risk and recovery was far from certain").

Third, the court found that counsel's performance generated benefits beyond the cash settlement fund. During the litigation, Microsoft agreed to hire roughly 3000 class members as regular employees and to change its personnel classification practices, a benefit counsel valued at $101.48 million during the 1999-2001 period alone. *Vizcaino*, 142 F.Supp.2d at 1301 n. 1. The court observed that the litigation also benefitted employers and workers nationwide by clarifying the law of temporary

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[3] Objectors' argument that the district court should have considered the IRS investigation, which resulted in subjecting the workers to income tax withholding, is beside the point. Because Microsoft had conceded that the workers were common law employees, the pivotal issue, to which the IRS investigation was irrelevant, was whether the signed agreements stipulating that they were "responsible to pay all ... [their] own benefits" precluded recovery. *Vizcaino*, 120 F.3d at 1009; *see also Vizcaino*, 97 F.3d at 1197-99.

worker classification. Moreover, it noted that as a result of this litigation, many workers who otherwise would have been classified as contingent workers received the benefits associated with full time employment. Incidental or non-monetary benefits conferred by the litigation are a relevant circumstance. *See In re Pac. Enter.*, 47 F.3d at 379 (considering "nonmonetary benefits in the derivative settlement"); *cf. Bebchick*, 805 F.2d at 408 (allowing an upward adjustment to the lodestar "to reflect the benefits to the public flowing from [the] litigation"); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 395, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970) (stating that a corporation may receive a substantial benefit from a derivative suit justifying a fee award regardless of whether the benefit is pecuniary).

Fourth, the court found the 28% rate to be at or below the market rate. It cited the retainer agreements between counsel and the named plaintiffs promising to pay class counsel 30% of any recovery. The agreements alone, although somewhat probative of a reasonable rate, are not particularly helpful. For instance, the retainer agreements did not involve the class and, because they were made precertification, are not binding on the class. However, the district court did credit class counsel's evidence showing that the retainer agreements reflected the standard contingency fee for similar cases. This finding does not constitute an abuse of the court's discretion.

We note with respect to this factor that we do not adopt the Seventh Circuit's approach in percentage fee award cases, as set forth in *In re Continental Illinois Securities Litigation*, 962 F.2d 566, 568 (7th Cir.1992). There, that court stated that in awarding fees in common fund cases, courts should determine a reasonable fee by

attempting to replicate the market rate. While an exclusively market-based approach may have superficial appeal, in the context of class action litigation in which attorneys' fees are determined *post hoc* by the court (without regard to any private arrangement), it may in many cases be illusory. Unlike in cases where lawyers compete for lead counsel status and may even bid in a court-supervised auction, in employment class actions like this one, no ascertainable "market" exists. *See, e.g.,* ALAN HIRSCH AND DIANE SHEEHEY, AWARDING ATTORNEY'S FEES AND MANAGING FEE LITIGATION 99-101 (1994) (describing practice sometimes used in the Northern District of California); *In re Auction Houses Antitrust Litig.,* 2001 Trade Cas. (CCH) ¶ 73,170, 2001 WL 170792 (S.D.N.Y. Feb.22, 2001). The "market" is simply counsel's expectation of court-awarded fees. The Seventh Circuit's effort to construct a market for such cases by determining what counsel "would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client" seems to us an unhelpful measure in many cases, and certainly an inappropriate measure to apply to *all* cases. *In re Cont'l Ill.,* 962 F.2d at 572. Unlike commercial litigation where the fee is determined by application of the negotiated contingency percentage to the amount of the recovery, in class action litigation the fee is determined on the basis of what a court finds to be reasonable. An attempt to "estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers [ ] had bargaining occurred at the outset of the case" strikes us as entirely illusory and speculative. *In re Synthroid Mktg. Litig.,* 264 F.3d 712, 718 (7th Cir.2001). Where evidence exists, such as here, about the percentage fee to which some plaintiffs agreed *ex ante,* that evidence may be probative of the fee award's reasonableness. But, to the

extent that a market analogy is on point, in most cases it may be more appropriate to examine lawyers' reasonable expectations, which are based on the circumstances of the case and the range of fee awards out of common funds of comparable size.[4]

Fifth, the court found that counsel's representation of the class – on a contingency basis – extended over eleven years, entailed hundreds of thousands of dollars of expense, and required counsel to forgo significant other work, resulting in a decline in the firm's annual income. These burdens are relevant circumstances. *Six (6) Mexican Workers,* 904 F.2d at 1311 (noting that litigation lasted more than thirteen years); *Torrisi,* 8 F.3d at 1377 (considering counsel's bearing the financial burden of the case); *Bebchick,* 805 F.2d at 407 (same).

We conclude that the district court considered the relevant circumstances and did not abuse its discretion in finding a 28% fee award to be reasonable under the percentage method.

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[4] The award was within the range of fees awarded in settlements of comparable size. The Appendix to this opinion surveys fee awards from 34 common fund settlements of $50-200 million from 1996-2001, with fees awarded under the percentage method. Awards here range from 3-40%, with most (27 of 34, or 79%) awards around 10-30% and a bare majority (19 of 34, or 56%) clustered in the 20-30% range. *See also* ALBA CONTE, ATTORNEY FEE AWARDS §§ 2.09, 2.33 and 2.34 (2d ed.1993and Nov. 2001 Supp.) (surveying common fund settlements of $25-200 million and finding a range of 1-30%, with most awards around 5-20%).

II. THE DISTRICT COURT'S LODESTAR CROSS-CHECK

The district court applied the lodestar method as a cross-check of the percentage method. Calculation of the lodestar, which measures the lawyers' investment of time in the litigation, provides a check on the reasonableness of the percentage award. Where such investment is minimal, as in the case of an early settlement, the lodestar calculation may convince a court that a lower percentage is reasonable. Similarly, the lodestar calculation can be helpful in suggesting a higher percentage when litigation has been protracted. Thus, while the primary basis of the fee award remains the percentage method, the lodestar may provide a useful perspective on the reasonableness of a given percentage award.[5]

The court found that counsel's fees for work done on this case, if charged at current hourly rates, would amount to $7,386,876. It found nothing in the record to suggest that any of the hours claimed should be disallowed. Objectors quibble about some of the hours and charges, but we find no abuse of discretion. *See WPPSS,* 19 F.3d at

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[5] We do not mean to imply that class counsel should necessarily receive a lesser fee for settling a case quickly; in many instances, it may be a relevant circumstance that counsel achieved a timely result for class members in need of immediate relief. The lodestar method is merely a cross-check on the reasonableness of a percentage figure, and it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement. *Camden I Condominium Ass'n,* 946 F.2d at 773-74 (citing *Court Awarded Attorney Fees,* Report of the Third Circuit Task Force, 108 F.R.D. 237, 242 (1985)).

1298-99. Calculating fees at prevailing rates to compensate for delay in receipt of payment was within the district court's discretion. *See Gates v. Deukmejian,* 987 F.2d 1392, 1406 (9th Cir.1992).

Objectors' principal quarrel is with the district court's lode star cross-check, which resulted in a multiplier of 3.65. The court found this number reasonable by considering the factors in *Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67, 69-70 (9th Cir.1975), including "the complexity of this case, the risks involved and the length of the litigation." *Vizcaino,* 142 F.Supp.2d at 1306. The bar against risk multipliers in statutory fee cases does not apply to common fund cases. *WPPSS,* 19 F.3d at 1299-1300. Indeed, "courts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases." *Id.* at 1300. This mirrors the established practice in the private legal market of rewarding attorneys for taking the risk of nonpayment by paying them a premium over their normal hourly rates for winning contingency cases. *Id.* at 1299. In common fund cases, "attorneys whose compensation depends on their winning the case[ ] must make up in compensation in the cases they win for the lack of compensation in the cases they lose." *Id.* at 1300-01 (internal citation and quotation omitted). Class counsel here have represented that they would not have taken this case other than on a contingency basis. They perform little work on an hourly basis, and the rates they submitted were what they took to be market rates, in other words, rates that did not already reflect an expectation of excellent results.

Thus, a multiplier was appropriate in this case. The district court's percentage of the fund analysis discussed above addressed the substantial risk class counsel faced,

compounded by the litigation's duration and complexity. The court considered these circumstances in arriving at a multiplier which was within the range of multipliers applied in common fund cases.[6] We find no abuse of discretion.[7]

III. THE DENIAL OF OBJECTORS' REQUEST FOR ATTORNEYS' FEES

Objectors contend that the district court abused its discretion in rejecting their request for attorneys' fees, arguing that they caused the district court to require class counsel to submit time records and that they brought about minor procedural changes in the settlement agreement. Because objectors did not increase the fund or otherwise substantially benefit the class members, they were not entitled to fees. *Bowles,* 121 Wash.2d at 70- 71, 847 P.2d 440 (stating that under Washington law, fees may be awarded only if authorized by "contract, statute or recognized ground in equity" (internal citation and quotation omitted)). The equitable common fund/common benefit doctrine "authorizes attorney fees only when the litigants preserve or create a common fund for the benefit of others as well as themselves." *Id.; Class Plaintiffs v. Jaffe & Schlesinger, P.A.,* 19 F.3d 1306, 1308 (9th

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[6] *See* Appendix (finding a range of 0.6-19.6, with most (20 of 24, or 83%) from 1.0-4.0 and a bare majority (13 of 24, or 54%) in the 1.5-3.0 range); *Prudential,* 148 F.3d at 341 ("[M]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." (quoting 3 NEWBERG § 14.03 at 14-5)).

[7] Objectors' argument that the district court should have appointed an expert is meritless. While the court has discretion to appoint an expert under Federal Rule of Evidence 706, objectors have not shown how its decision not to do so was an abuse of discretion.

Cir.1994). In the absence of a showing that objectors substantially enhanced the benefits to the class under the settlement, as a matter of law they were not entitled to fees, and the district court did not abuse its discretion.[8]

CONCLUSION

"Because in common fund cases the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage, courts have stressed that when awarding attorneys' fees from a common fund, the district court must assume the role of fiduciary for the class plaintiffs." *WPPSS,* 19 F.3d at 1302. Accordingly, fee applications must be closely scrutinized. Rubber-stamp approval, even in the absence of objections, is improper. We are satisfied that in this case, the district court subjected the application to the requisite scrutiny and did not abuse its discretion in determining a reasonable fee in light of the relevant circumstances of the case.

AFFIRMED.

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[8] Because the court could treat objectors' application for fees as a motion raising a dispositive issue of law, Federal Rule of Civil Procedure 54(d)(2)(C) did not apply and no findings of fact were required under Federal Rule of Civil Procedure 52(a).

Appendix

Table of Percentage-Based Attorneys' Fee Awards in Common Fund Cases of $50-200 million (1996-2001)[1]

Case	*Fund*	*Fee(%)*	*Fee($)*	*Multiplier*
In re Rite Aid Corp. Sec. Litig., 146 F.Supp.2d 706 (E.D.Pa.2001)[2]	$193m	25.0%	$48m	4.5-8.5
In re Lease Oil Antitrust Litig., 186 F.R.D. 403 (S.D.Tex.1999)	$190m	25.0%	$47m	1.4
In re Merry-Go-Round Enterprise, Inc., 244 B.R. 327 (Bankr.D.Md.2000)[3]	$185m	40.0%	$71m	19.6
In re Copley Farm., Inc., 1 F.Supp.2d 1407 (D.Wyo.1998)	$150m	13.0%	$20m	2.0

[1] This survey includes all class actions involving common funds of $50-200 million from which fees were calculated using the percentage method, found in the Westlaw ALLCASES database and Class Action Reports' attorneys' fees section from Jan. 1, 1996 through Dec. 31, 2001. All dollar amounts are rounded to the nearest million; all percentages are rounded to one-tenth of a percent. Multipliers are listed where courts conducted a lodestar cross-check.

[2] The court cited the multiplier range from counsel's estimates without extensive discussion. Id. at 736 n. 44.

[3] The court calculated the multiplier based on counsel's logs of 12,087 hours and an assumed hourly rate of $300, concluding "that it is inappropriate to use a lode-star analysis post-recovery to determine a reasonable fee." Id. at 335.

Walco Investments, Inc. v. Thenen, 975 F.Supp. 1468 (S.D.Fla.1997)[4]	$141m	15.0%	$21m	1.8
In Re Informix Corp. Sec. Litig., No. 97-1289 (N.D.Cal. Nov. 23, 1999) (Breyer, J.); cited at 21 Class Action Reports 261 (2000)	$137m	30.0%	$40m	–
In Re Combustion, Inc., 968 F.Supp. 1116 (W.D.La.1997)	$127m	36.0%	$46m	3.0
Kurzweil v. Philip-Morris Co., 1999 WL 1076105 (S.D.N.Y.1999) (Mukasey, J.)	$124m	30.0%	$37m	–
In Re Sumitomo Copper Litig., 74 F.Supp.2d 393 (S.D.N.Y.1999)[5]	$117m	27.5%	$32m	2.5

[4] The court noted that this fund included the cash value of waived claims (estimated at $15 million) and tax refunds (estimated at $1.5 million), and indicated that the actual value of the fund might be higher. Id. at 1470 n. 3.

[5] Although recovery for the class was $135 million, preexisting agreement limited the compensable amount to $117 million. Based on the $135 million figure, the award percentage was 23.8%. Id. at 394.

Local 56, United Food & Comm'l Workers Union v. Campbell Soup Co., 954 F.Supp. 1000 (D.N.J.1997)	$115m	2.8%	$3m	2.4
In Re Ikon Office Sol'ns, Inc., Sec. Litig., 194 F.R.D. 166 (E.D.Pa.2000)[6]	$112m	29.0%	$32m	2.5
In Re Sunbeam Sec. Litig., Fed. Sec. L. Rep. P 91,656, 2001 WL 1636315 (S.D.Fla. Nov.29, 2001)	$110m	25.0%	$28m	–
Bussie v. Allamerica Fin'l Corp., No. Civ. A. 97-40204, 1999 WL 342042 (D.Mass. May 19, 1999)[7]	$108m	7.1%	$ 8m	3.3

[6] The court based its calculations on what it described as the "net settlement fund," or roughly $108 million (roughly $112 million minus roughly $1 million in costs). We use the gross settlement fund amount, to maintain consistency with other cases listed. (Although it described the net fund as $108,915,874.43, the costs as $3,825,497.86, and 30% of the net fund as $32,404,744.33, the fees of roughly $32.4 million were actually 30% of $108,015,814.43. Id. at 193. Elsewhere, the court describes the gross fund as $111 million, with earned interest of $841,000 in five months. Id. at 172.)

[7] The court estimated the fund value at $108 million but noted that "the actual value of the settlement may fall significantly short of the estimated value." Id. at *2. It therefore awarded the first $4 million in attorneys fees immediately and withheld the remainder pending further order. Id. at *3.

Haynes v. Shoney's, No. 89-30093-RV, 1993 WL 19915 (N.D.Fla. Jan.25, 1993)[8]	$105m	23.2%	$24m	–
Ingram v. The Coca-Cola Co., 200 F.R.D. 685 (N.D.Ga.2001)[9]	$104m	20.0%	$21m	2.5-4.0
Bowling v. Pfizer, Inc., 922 F.Supp. 1261 (S.D.Ohio 1996)[10]	$103m	10.0%	$10m	2.1
Fanning v. Acromed Corp., No. 1014, C.A. 97-381, 2000 WL 1622741 (E.D.Pa. Oct. 23, 2000)[11]	$100m	12.0%	$12m	0.6

[8] In addition to the common fund of $105 million, other relief was valued at $30 million.

[9] The fund amount excludes $10 million in a "Promotional Achievement Fund" and $43.5 million in "future pay equity adjustments." Id. at 688.

[10] The settlement allowed the fund of roughly $103 million to increase by up to roughly $63 million in the following ten years, and counsel were allowed to petition for 10% of the increase amount each year, up to an additional $6 million approximately. Id. at 780.

[11] The defendant's assets were worth only $58 million. Id. at *5.

Baird v. Thompson Consumer Elecs., No. 00-761 (Ill. Cir. Court. Madison Co. June 15, 2001) (Matoesian, J.); cited at 22 Class Action Reports 800 (2001)	$100m	22.0%	$22m	–
Rosted v. First USA Bank, No. 97-1482 (W.D. Wash. June 15, 2001) (Lasnik), J.); cited at 22 Class Action Reports 799-800 (2001)[12]	$87m	11.8%	$10m	3.0
In Re Sorbates Direct Purchaser Antitrust Litig., No. 98-4886 (N.D.Cal. Nov. 20, 2000) (Legge, J.); cited at 22 Class Action Reports 90 (2001)	$82m	25.0%	$20m	–

[12] The court noted that a multiplier of at least 3.0 would be appropriate, but that would have resulted in an award greater than that requested by counsel.

In Re Aetna, Inc. Sec. Litig., Fed. Sec. L. Rep. P 91,322, 2001 WL 20928 (E.D.Pa. Jan.4, 2001)[13]	$83m	29.5%	$24m	3.6
In Re Paracelsus Corp. Sec. Litig., No. 96-3464 (S.D. Tex Jul 22, 99) (Werlein, J.); cited at 21 Class Action Reports 262 (2000)	$80m	23.0%	$18m	–
In Re Commercial Explosives Anti-trust Litig., MDL No. 1093 (D.Utah Dec. 29, 1998) (Sam, J.); cited at 20 Class Action Reports 532 (1997)	$77m	30.0%	$23m	2.5
Van Vranken v. ARCO, 901 F.Supp. 294 (N.D.Cal.1995)	$76m	25.0%	$19m	3.6
Ramah Navajo Chapter v. Babbitt, 50 F.Supp.2d 1091 (D.N.M.1999)	$76m	11.0%	$ 8m	–

[13] The court described the fee as 30% of the net fund of roughly $81 million, after subtracting roughly $2 million in costs. We use the gross settlement fund amount, to maintain consistency with other cases listed.

Branch v. F.D.I.C., No. Civ. A. 91-CV-3270, 1998 WL 151249 (D.Mass. March 24, 1998)[14]	$75m	8.6%	$ 6m	2.1
In Re IDB Communication Group, Inc., Sec. Litig., No. 94-3618 (C.D.Cal. Jan. 17, 1997) (Hupp, J.); cited at 19 Class Action Reports 472-73 (1996)[15]	$75m	16.5%	$12m	6.2
In Re 1996 Medaphis Corp. Sec. Litig., No. 96-2088 (N.D.Ga. Mar. 27, 1998) (Thrash, J.); cited at 20 Class Action Reports 295 (1997)[16]	$73m	25.0%	$18m	–
In Re MiniScribe Corp., 257 B.R. 56 (Bankr.D.Colo.2000)	$67m	4.5%	$ 3m	1.7

[14] The court described the $75 million figure as "the likely amount" of the fund. Id. at *2

[15] The court noted that the lodestar of approximately $2 million "would have to be deflated an estimated 10% to 20% for some excessive rates and duplicative hours," resulting in a multiplier of 6.9-7.7.

[16] Fund consisted of a mix of cash, stock, and warrants, so fees were granted in same proportion.

In Re Nat'l Health Laboratories Sec. Litig., Nos. 92-1949 & 93-1694 (S.D.Cal. Aug. 15, 1995) (Brooks, M.J.); cited at 19 Class Action Reports 64-65 (1996)[17]	$64m	30.0%	$19m	2.3
In Re Teletronics Pacing Systems, Inc., 137 F.Supp.2d 1029 (S.D.Oh.2001)	$62m	26.6%	$17m	1.0
In Re Medical Care America, Inc. Sec. Litig., No. 92-1996 (N.D.Tex. Apr. 26, 1996) (Robinson, J.); cited at 19 Class Action Reports 66 (1996)	$60m	27.5%	$17m	–
In Re Melridge, Inc., Sec. Litig., No. 87-1426 (D. Or. March 19, 1992, Nov. 1, 1993, and April 15, 1996) (Frye, J.); cited at 19 Class Action Reports 65-66 (1996)	$54m	37.1%	$20m	1.4

[17] The 2.3 multiplier is inflated because the lodestar is based on historical (not prevailing) hourly rates and therefore fails to compensate attorneys for the time value of money.

In Re Carbon Dioxide Antitrust Litig., 1996-2 Trade Cases P 71,522, 1996 WL 523534 (M.D.Fla. July 15, 1996)[18]	$53m	18.0%	$10m	1.2

[18] The court described the award as 18.5% of the net fund (after subtracting roughly $1.6 million in costs). Id. at *2.

Donna VIZCAINO, et al., Plaintiffs,

v.

MICROSOFT CORPORATION, et al., Defendants.
Rebecca Hughes, et al., Plaintiffs,

v.

Microsoft Corporation, et al., Defendants.

Nos. C93-178C, C98-1616C

United States District Court,
W.D. Washington,
at Seattle.

April 16, 2001.

David F. Stobaugh, Stephen K. Strong, Brian J. Wald, Stephen K. Festor, Bendich, Stobaugh & Strong, Seattle, WA, for Donna Vizcaino, Jon R. Waite, Mark Stout, Geoffrey Culbert, Lesley Stuart, Thomas Morgan, Elizabeth Spokoiny, Larry Spokoiny, plaintiffs.

Fredric C. Tausend, Carol S. Arnold, Preston Gates & Ellis, Seattle, WA, Theodore O. Rogers, Jr, Sullivan & Cromwell, New York City, Richard H. Sauer, Sullivan & Cromwell, Washington, DC, James D. Oswald, William H. Song, Michael Paul Monaco, Song Oswald & Mondress PLLC, Seattle, WA, for Microsoft Corp, and its health and benefits plans: Health Benefit Plan, Life Insurance Plan, Short-term and Long-term Disability Plans, and Savings (401K) Plan, defendant.

Lawrence W. Schonbrun, Berkeley, CA, Dale Melvin Foreman, Wenatchee, WA, David B. Bukey, Seattle, WA, for Objector Class Members.

ORDER

COUGHENOUR, Chief Judge.

I. INTRODUCTION

Following notice and hearing in accordance with Fed.R.Civ.P. 23, this class action has been settled for a compromise payment of $96.885 million. Counsel for the plaintiffs and class members have applied for an award of attorneys fees, including reimbursement of litigation expenses, to be paid from the common fund. As the settlement agreement now stands, Class Counsel has requested a percentage-based fee of $27,127,800 (including, *not* adding – several hundred thousand dollars in expenses), which is 28% out of an approximately $97 million cash Settlement Fund, or less than 20% of the common fund.[1]

II. STANDARD TO BE APPLIED

There is no doubt that Counsel have performed capably. Out of a class of potentially 30,000 members, only

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[1] Class Counsel notes that relief for the class not only included the $96.885 million cash settlement fund, but also the conversion of 3,000 class members into "regular" W-2 status Microsoft employees in fiscal year 1999 alone, which entitles them to participate in Microsoft's employee benefit programs. Assuming the same number of class members would receive these benefits for two years, 1999-2001, the value of these benefits is approximately $33,826 per class member or $101.48 million for 3,000 members of the class. Class Counsel notes that the total common fund in this case is thus $198.365 million ($96.885 million in cash + $101.48 million for the value of benefits). Accordingly, the attorneys fees specified in the Settlement Agreement for class counsel, $27.1278 million, constitute only 14% of the *total* common fund (or 28% of the cash in the Settlement Fund).

one group of a handful of objectors has objected to the fee request. The Court must nevertheless be careful to protect the interests of the settlement fund beneficiaries by ensuring that the fee award is reasonable under the circumstances. As stated in *In re WPPSS Litigation,* 19 F.3d 1291, 1302 (9th Cir.1994):

> Because in common fund cases the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage, courts have stressed that when awarding attorneys' fees from a common fund, the district court must assume the role of fiduciary for the class plaintiffs.

The Ninth Circuit has held that generally, in determining attorneys fees in a common fund case, the court has discretion to use either the lodestar method or the percentage method. *Id.* District Courts often use the lodestar method as a cross-check on the percentage method in order to ensure a fair and reasonable result. *See In re Immunex Securities Litigation,* 864 F.Supp. 142, 144 (W.D. Wa. 1994). However, courts have held that when state substantive law applies, attorneys' fees are to be awarded in accordance with state law. *Johnson v. Incline Village General Improvement Dist.,* 5 F.Supp.2d 1113, 1114 (D.Nev. 1998). *Mangold v. California Public Utilities,* 67 F.3d 1470, 1478-9 (9th Cir. 1995), held that this principle applies to supplemental state claims as well as to diversity claims. Under Washington law, the percentage method, without a lodestar cross-check, should be used in common fund cases. *Bowles v. Department of Retirement Systems,* 121 Wash.2d 52, 70-74, 847 P.2d 440 (1993).

The Ninth Circuit has summarized these approaches, as follows:

> Under the lodestar/multiplier method, the district court first calculates the "lodestar" by multiplying the reasonable hours expended by a reasonable hourly rate. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 565, 106 S.Ct. 3088, 3098, 92 L.Ed.2d 439 (1986). The court may then enhance the lodestar with a "multiplier," if necessary, to arrive at a reasonable fee. *Blum v. Stenson,* 465 U.S. 886, 888, 104 S.Ct. 1541, 1543, 79 L.Ed.2d 891 (1984). Under the percentage method, the court simply awards the attorneys a percentage of the fund sufficient to provide plaintiffs' attorneys with a reasonable fee. *Paul, Johnson, Alston, & Hunt v. Graulty,* 886 F.2d 268, 272 (9th Cir.1989).

Id. at 1294, n. 2. The Ninth Circuit has recognized however, that neither method should be applied in a formulaic or mechanical fashion. *Id.*

There is some dispute in this case as to whether state law or federal law applies to the determination of the reasonableness of attorneys fees. However, as discussed below, this Court finds that the requested fees are reasonable under both methodologies. Whether a court applies the lodestar or the percentage method, the main requirement is that fee awards in common fund cases be reasonable under the circumstances. *Florida v. Dunne,* 915 F.2d 542, 545 (9th Cir.1990).

III. APPLYING STATE LAW – PERCENTAGE METHOD

According to Class Counsel, the settlement fund created for the class is derived from their successful claim for employee benefits under Microsoft's Employee Stock

Purchase Plan (ESPP). The ESPP claim was based on, and decided under, Washington State contract law. Accordingly, the law of Washington governs the determination of whether class counsel's attorney fee request is reasonable. *See Mangold v. California Utilities,* 67 F.3d 1470, 1478 (9th Cir. 1995). The Washington Supreme Court has held that the percentage-of-recovery approach is used in determining attorneys fees in a common fund class action. *Bowles v. Department of Retirement Systems,* 121 Wash.2d 52, 70-74, 847 P.2d 440 (1993) (class action concerning calculation of public employees' retirement benefits). The Washington Supreme Court rejected the lodestar method for determining attorneys fees in a common fund action. The Supreme Court stated that "[i]n common fund cases, the size of the recovery constitutes a suitable measure of the attorneys' performance." *Id.* at 72, 847 P.2d 440. "[U]nder the percentage of recovery approach, the attorneys are to be compensated according to the size of the judgment recovered, not the actual hours expended." 121 *Bowles,* Wash.2d at 75. The Court defined the "benchmark" percentage of recovery fee as 25% of the recovery obtained, including future benefits, with 20 to 30% as the usual range of common fund fees. *Id.,* at 72-73, 847 P.2d 440.

After a careful review of the record and surrounding circumstances, the Court determines that the undisputed facts in the record show class counsel's percentage of recovery fee request is reasonable. The Court considered several factors in making this determination. First, Class Counsel achieved exceptional results for the class. In a common fund case, "the size of the recovery constitutes a suitable measure of the attorneys' performance." *Bowles,* 121 Wash.2d at 72, 847 P.2d 440. The Settlement Agreement

here creates a $96.885 million Settlement Fund to compensate class members for past Employee Stock Purchase Plan (ESPP) gains which they were denied. The common fund constitutes extraordinary relief in this case, because, as Class Counsel note, there were no controlling precedents when Class Counsel agreed to pursue the case, Class Counsel had to overcome the potentially dispositive fact that the class members had signed agreements stating they had no rights to benefits, and Microsoft fought this case vigorously for years.

Second, the Court recognizes that the case was extremely risky for class counsel to pursue because of negative facts, no controlling law and the vigorous defense of the case. Courts have recognized that a high risk factor is one reason for increasing class counsel's attorney fee award above the "benchmark" 25% fee. *In re Pacific Enterprises Securities Litigation,* 47 F.3d 373, 379 (9th Cir. 1995) (33% of the common fun [sic] as attorneys fees was justified because of the complexity of the issues and the risks); *Williams v. Boeing Co.,* No. C98-761 (W.D. Wash. 1999) (28% of the common fund as attorneys fees was reasonable in employment discrimination class action because, among other reasons, of "the risks to the plaintiffs' counsel's firm"). On the other hand, a fee lower than the "benchmark" 25% may be appropriate, if a civil action simply "piggy-backs" on another case.

Here there are multiple reasons why the case was extremely risky for counsel to pursue. For example, there were no controlling precedents concerning their claims, only analogies involving various areas of law. In addition, Class Counsel's risk was even greater, and their work made more difficult, because Microsoft is one of the nation's largest and most formidable companies and it, and

several law firms, defended the case vigorously for several years.

Furthermore, Class Counsel had to overcome the significant obstacle presented by the fact that the class members had signed agreements with Microsoft under which they supposedly gave up their right to employee benefits. Many lawyers arguably would not have agreed to represent the plaintiffs because of the agreements they had signed. Indeed, the district court dismissed the plaintiffs' ESPP claim because of this fact. Doc. 223, Order [6/20/94], p. 4 ("the contract between Microsoft and the plaintiffs specifically stated that no benefits were provided by Microsoft"). The dissenting opinions in *Vizcaino I* and *Vizcaino II* were also largely based on this fact. *Vizcaino I,* 97 F.3d at 1201 (Trott, J. dissenting) ("these plaintiffs had express contracts for 'no benefits'"); *Vizcaino II,* 120 F.3d at 1019 (O'Scannlain J., *et al.,* dissenting) ("[m]oreover, the [plaintiffs] each signed contractual documents which expressly states that they would not receive any benefits").

The high risk Class Counsel faced is also shown by the repeated losses the class suffered in the district court which, had the decisions stood, would have resulted in no or little recovery for the class. Even in 1998, after representing the plaintiffs for nine years and winning twice in the Ninth Circuit, class counsel still faced the prospect of obtaining extremely little relief for the class when the Court redefined the class to only include employees who started to work at Microsoft *after* 1990. This would have potentially reduced the class to only 100-200 members. Class Counsel however successfully petitioned the Ninth Circuit for an extraordinary writ of mandamus that restored the class definition so that workers misclassified as *non*-employees at Microsoft after March, 1990 were

again included. *Vizcaino III,* 173 F.3d 713 (9th Cir. 1999). Class counsel then successfully responded to Microsoft's petition for rehearing *en banc* and its petition for writ of certiorari in the Supreme Court. 184 F.3d 1070 (9th Cir.1999), *cert. denied,* 528 U.S. 1105, 120 S.Ct. 844, 145 L.Ed.2d 713 (2000).

Third, the Court recognizes that Class Counsel's efforts resulted in significant nationwide public benefit. The case is the subject of articles in the Harvard Law Review, American Journal of Trial Advocacy, Berkeley Technology Law Journal, National Law Journal, The Washington Post, Business Week, New York Times, Wall Street Journal, Los Angeles Times, Lawyers Weekly USA, and the American Bar Association Journal. As a result of this case and the large amount of publicity surrounding it, many employers have been advised to carefully ensure their workers are properly classified so that they will not get into the same trouble as Microsoft. Workers who would have otherwise been mis-classified as contingent workers are being properly classified as employees and receiving the benefits that are inherent in that classification.

Fourth, class counsel argues that the requested fee of approximately 28%, is equal to or lower than the market rate and thus reasonable. Judge Posner of the Seventh Circuit stated that in awarding attorneys fees to class counsel, courts should attempt to replicate the market rate. *In re Continental Illinois Sec. Litig.,* 962 F.2d 566, 568 (7th Cir. 1992). ("in awarding fees courts should determine what the lawyer would have received if he were selling his services in the market rather than being paid by court order."). Thus if the market rate is a contingent fee percentage of recovery, "class counsel are entitled to the fee they would have received had they handled a

similar suit on a contingent fee basis, with a similar outcome." *Id.* at 572. Class Counsel argue that due to a variety of factors, including the nature of the Defendant, the novel and complex issues presented, the risk and the expense of litigating a class action, no rational private lawyer in the nation would have taken this case for less than one-third of any recovery. The Court agrees. Furthermore, the named plaintiffs in this case agreed to pay class counsel 30% of any recovery in their retainer agreements, which is higher than class counsel's request for attorney fees here. Therefore, the requested fees in this case are at or below the market rate. The Court also recognizes that an award of attorneys fees at the market rate is necessary to provide attorneys the incentive to take employee class actions, and without such an incentive, employees would be faced with substantial difficulties finding counsel willing to undertake meritorious, but high-risk, litigation.

Fifth, the Court notes that Class Counsel represented the plaintiffs for a significantly long time on a contingent fee basis. Class Counsel signed contingent fee retainer agreements here with the named plaintiffs more than 11 years ago. The retainer agreements provided that the named plaintiffs retained Class Counsel to bring a class action against Microsoft for employee benefits, and in consideration of class counsel undertaking the representation, the named plaintiffs agreed to pay class counsel 30% of any recovery. The representation of a class for more than a decade on a contingent-fee basis is, of course, an extremely long time to represent a client without getting paid and without knowing when, and if you will ever get paid. Class Counsel also incurred hundreds of thousands of dollars in expenses in connection with the *Vizcaino* case,

had to forgo significant other work to pursue the case, and the firm's annual income greatly declined as a consequence.

Therefore, based on these 5 factors, the Court finds that the fee request is both reasonable and warranted using a percentage method.

IV. APPLYING FEDERAL LAW - LODESTAR CROSS-CHECK

Under Ninth Circuit case law, in making the decision of reasonableness of attorneys fees, the court in a common fund case has discretion to use either the lodestar method or the percentage method. *In re WPPSS,* 19 F.3d at 1295-96. District Courts often use the lodestar method as a cross-check on the percentage method in order to ensure a fair and reasonable result. *See In re Immunex Securities Litigation,* 864 F.Supp. 142, 144 (W.D. Wa. 1994). Accordingly, in this case the lodestar method will be used as a cross-check on the percentage method, as often must be done to assure a fair and reasonable result. *See In re WPPSS,* 19 F.3d at 1296-98.

Similar to state law, under federal case law, the "benchmark" percentage of recovery fee is 25% of the recovery obtained, including future benefits, with 20 to 30% as the usual range of common fund fees. *Paul Johnson, Alston & Hunt v. Graulty,* 886 F.2d 268, 272 (9th Cir. 1989) ("fees awards range form [sic] 20 percent to 30 percent of the fund created[;] . . . the 'bench mark' percentage for the fee award should be 25 percent"); *In re Activision Securities Litigation,* 723 F.Supp. 1373, 1377 (N.D. Ca. 1989) ("this court finds that in most recent cases the benchmark is closer to 30%").

The lodestar cross-check fee would be as follows:

Type of Employee	Number of Hours	Hourly Rate	Fees Earned
Partners	13,417 hrs	$350/hr	$5,031,375
Non-Partners	4,370 hrs	$250-$300/hr	$1,237,950
Non-Lawyer Staff	6,104 hrs	$100/hr	$ 610,400
Legislative Advocacy			$ 507,151
		Subtotal	$7,386,870

Therefore, the declarations and other materials filed by plaintiff's counsel show that their fees for work done on this case, if charged at current hourly rates, would come to $7,386,876. Nothing in the record suggests that any of the hours claimed should be disallowed. The lodestar is thus $7,386,876.

As noted above, Class Counsel faced many obstacles and took a major risk in handling this litigation on a contingency basis. To restrict Class Counsel to the hourly rates they customarily charge for non-contingent work – where payment is assured – would deprive them of any financial incentive to accept contingent-fee cases which may produce nothing. Courts have therefore held that counsel are entitled to a multiplier for risk. *See In re WPPSS,* 19 F.3d at 1301-02.

With a multiplier of four, the fee would be $29,547,504, excluding several hundred thousand dollars

in expenses to be added on top. If the multiplier were only three, the fee would be $22,160,628 excluding expenses.

Class Counsel argues that in light if [sic] the extraordinary risk, difficulty, complexity, and exceptional results of the case, a multiplier of at least six and up to twenty or higher would be appropriate. *In re Cendant,* 109 F.Supp.2d 285, 292, 302 (D.N.J.2000) (multiplier of 23 or 32); 1 Conte, *Attorney Fee Awards* § 2.06 (1993), p. 39 (multiplier of 5-10); 3 *Newberg on Class Actions* § 14.03, p. 14-5 and n. 21 (1992) (citing multipliers of five and ten in "large common fund" cases). In determining an appropriate market rate, a district court may make reference to the factors developed by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir. 1974) and approved by this Court in *Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied,* 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976). Those factors include:

> (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and

length of the professional relationship with the client, and (12) awards in similar cases.[2]

Kerr, 526 F.2d at 70.

Looking at these factors and in light of the complexity of this case, the risks involved and the length of the litigation, a multiplier of at least 3 or 4 is wholly justified. Therefore, the lodestar approach would result in a fee of between $29,547,504 and $22,160,628. Comparing this to the percentage method fee of $27,127,800, the requested attorneys fees appear reasonable in this case.

V. CONCLUSION

For the reasons stated, it is hereby ORDERED that Class Counsel is awarded $27,127,800 in attorneys fees and costs. The Court finds oral argument and appointment of an expert unnecessary.

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[2] The applicability of the sixth and tenth factors may be in doubt. *See City of Burlington v. Dague,* 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992). However, the Court here would reach the same result in this case with or without consideration of these two factors.

OPPOSITION

BRIEF

(2)

Supreme Court, U.S.
FILED
OCT 10 2002
OFFICE OF THE CLERK

No. 02-252

In The

Supreme Court of the United States

DONNA VIZCAINO and LESLEY STUART,
in their individual capacity,

Petitioners,

vs.

JON R. WAITE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

The court of appeals and all parties agree that this case, including the common fund attorney fee award, is governed by Washington state law, *not* by federal law, because the underlying claim was brought under Washington state common law. *Vizcaino v. Microsoft*, Pet., pp. A4-A5 (290 F.3d at 1047); p. A27 (142 F.Supp.2d at 1302); 97 F.3d at 1196; 120 F.3d at 1014. Petitioners, however, completely ignore Washington law, and do not cite or discuss even a single Washington case. Instead, Petitioners submit what is essentially a political essay advocating a "uniform" federal rule governing all fee awards, in disregard of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) (federal courts apply state law when a claim arises under state law). Petition, pp. 5, 16, 23.

Petitioners disregard American federalism, complaining about the "chaos" of decisions under differing state and federal statutes and the varying common fund principles in different jurisdictions. Pet., pp. 5, 14-16, 23, 30. No such argument was raised below. On the contrary, in the court of appeals Petitioners argued (App. Br. 24, 34-35) for a different interpretation of the leading Washington State Supreme Court decision on common fund fees, *Bowles v. Dept. of Retirement Systems*, 121 Wn.2d 52, 842 P.2d 440 (1993), and they made various procedural arguments on the "lodestar cross-check," App. Br. 19-22, 24-25, 31-39. They *never* argued that federal law could or should override Washington law.

Thus, the questions here are the following:

1) The Ninth Circuit ruled on the fee award by applying the standards in Washington state law for common fund fees because the underlying contract claim is

QUESTION PRESENTED – Continued

governed by Washington law. Pet., pp. A4-A5 (290 F.3d at 1047). Petitioners ignore Washington law and contend that there should be a "uniform" *federal* rule for all common fund fee awards, Pet., pp. 5, 23, in disregard of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). Did the court of appeals abuse its discretion by applying Washington state standards to determine a common fund fee arising from an underlying claim governed by Washington law when Petitioners never argued below that a rule of federal law should be created to override state law?

2) Washington law provides that common fund fee awards are intended to encourage employee benefit claims to be brought in class actions because the employees could not otherwise obtain relief. *Bowles v. Dept. of Retirement Systems*, *supra*, 842 P.2d at 450-52. The record shows that the plaintiff class here could not have brought and won this risky, difficult and lengthy (10-year) class action without the prospect that their class counsel would be compensated for the risks. Pet., pp. A9, A30-A34. Although Petitioners never argued below that risk must be ignored, the Petition now contends that risk should never be considered (Pet., pp. 9-21). Did the court of appeals abuse its discretion by following the Washington state law standard and approving a fee award that includes consideration of risk, particularly where Petitioners below disputed *only* the proper *application* of the standard?

Because Petitioners' arguments were not raised below and they all relate only to the district court's exercise of discretion under the standards of Washington state law, this case does not actually raise the "questions presented" in the Petition. It should be denied.

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STATUTE *NOT* INVOLVED

Petitioners quote (Pet., p. 2) the attorney fee section of a federal statute, ERISA, apparently only to mislead, trying to give the false impression that this case arises under federal law. The fee here was *not* sought or awarded under this ERISA section, or under any other federal law, because both the underlying claim here and the common fund fee award arise from the common law of Washington state. Pet., pp. A4-A5 (290 F.3d at 1047).

STATEMENT OF THE CASE

This case was filed in a Washington state court in 1992. Defendant Microsoft removed the case to federal district court because it included both claims under the common law of Washington and claims within ERISA. The ERISA claims were eventually all dismissed or otherwise removed from the case, along with most of the claims governed by Washington law. The *only* claim upon which plaintiffs prevailed was a claim that they were wrongfully excluded from Microsoft's Employee Stock Purchase Plan, which is a contract claim governed by the common law of Washington. 120 F.3d at 1014.

Eventually, eight years after the case was filed, the parties agreed to settle plaintiffs' Employee Stock Purchase Plan claim for about $97 million (plus many workers were converted to benefitted employees, giving substantial additional value to the class, Pet., p. A8). Because this claim is governed by Washington law, the common fund fee award from settlement of the claim is also governed by Washington law. Pet., pp. A4-A5 (290 F.3d at 1047). The Washington Supreme Court follows a percentage-based

approach to common fund fee awards in class actions for employee benefits. *Bowles v. Dept. of Retirement Systems*, 121 Wn.2d 52, 70-74, 842 P.2d 440, 450-52 (1993). The courts below thus followed *Bowles* in determining the appropriate percentage fee. The district court also conducted a "lodestar cross-check" to see whether the fee was reasonable in light of the time and effort required of class counsel in this case. The district court entered detailed findings for the fee award, both as to the percentage and the lodestar cross-check. Pet., pp. A29-A37.

Appellants (Petitioners here) are Lesley Stuart and Donna Vizcaino. Both Stuart and Vizcaino were originally *named plaintiffs*, not unnamed class members, and both signed retainer agreements in which they agreed to pay a 30% fee from their recovery. Pet., p. A33. They never disputed the validity or reasonableness of their retainer agreement.[1] The objection and this appeal resulted from an unsuccessful effort by Donna Vizcaino to obtain a secret

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[1] Accordingly, it was argued below, but not decided by the court of appeals, that Vizcaino and Stuart's uncontroverted written agreements to pay 30% made them lack standing to complain about a *lower* 28% fee applied to the class. Although the courts decide common fund fees for absent class members and statutory fee awards against defendants, percentage fee retainer agreements are binding on plaintiffs who signed them. *Venegas v. Mitchell*, 495 U.S. 82, 89-90 (1990). This principle applies in class action cases where some named plaintiffs have retainer agreements (which are binding) and others in the class pay a court-determined common fund fee. *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 270-72 (9th Cir. 1989); *Melendres v. Los Angeles*, 119 Cal.Rptr. 713, 723 (Cal.App. 1975). This is an independent ground for affirmance here because both Petitioners signed written agreements which they do not dispute. They personally thus have no standing to challenge the common fund fee for absent class members (*none* of whom dispute the common fund fee).

side deal to obtain several hundred thousand dollars from plaintiffs' counsel. CR 715. Vizcaino threatened to oppose the fee request unless she was paid off. When that threat was rejected, she organized this objection and appeal. *No* independent class members opposed the fee request. Indeed, more than 2,700 class members expressed their support for the entire settlement. CR 779, p. 14.

On appeal, Petitioners argued about the meaning of the Washington Supreme Court's holding in *Bowles*, basically contending that certain *facts* in *Bowles* constituted that court's holding. App. Br., pp. 21, 24, 34-35. Petitioners did *not* dispute the applicability of Washington law. With respect to the "lodestar cross-check," Petitioners maintained there were better methods by which it *procedurally* could have been conducted. App. Br., pp. 3-4, 11, 14, 19-22, 24-25, 31-39 (disputing hourly rates, some compensable hours, and some paralegal time and suggesting further review of time records, appointment of an expert, and further oral argument). Petitioners made *no* argument that a "uniform" federal rule on fee awards should be adopted to override Washington law, in derogation of *Erie Railroad*.

The Ninth Circuit affirmed. It independently examined the percentage fee award and determined it was reasonable. Pet., pp. A4-A11 (290 F.3d at 1047-50). It also reviewed the district court's lodestar cross-check and found there was no abuse of discretion, substantively or procedurally. Pet., pp. A12-A14 (290 F.3d at 1050-51).

REASONS FOR DENYING THE WRIT

I. PETITIONERS' CENTRAL ARGUMENT – THAT THE COURT SHOULD OVERRIDE STATE LAW AND ADOPT A "UNIFORM" NATIONWIDE RULE FOR ALL STATE AND FEDERAL FEE AWARDS, BOTH STATUTORY AND COMMON FUND – WAS NOT RAISED BELOW AND THEREFORE IS NOT PROPERLY PRESENTED HERE.

Petitioners purport to present questions here that were not raised below, particularly their central argument that *Erie Railroad v. Tompkins* should be disregarded in the interest of avoiding fee decision "chaos" by establishing a "uniform" nationwide rule, even though the fee award is governed by Washington law. Pet., pp. 9, 16, 23, 30. Moreover, Petitioners' specific proposal for a "uniform" nationwide rule – that "risk" or contingency should be disregarded (Pet., pp. 9-10) – was also not raised in the court of appeals.[2]

Petitioners' arguments are not properly presented here because it is "imprudent and unfair to inject a new standard at this stage in the litigation." *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993). The Court does not review a question that was neither pressed nor passed on below.

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[2] Moreover, in a Social Security Act case, the Court recently rejected the *same* argument made here – that the lodestar method used in statutory fee-shifting cases, *i.e.*, where the fees are paid by the losing defendant, should also be followed when the plaintiffs are paying their own lawyers. Claimants may owe contingent percentage fees even where the lodestar method would result in a lower fee. *Gisbrecht v. Blanchard*, 122 S.Ct. 1817, 1825-27 (2002).

Illinois v. Gates, 462 U.S. 213, 221 (1983) (questions not raised below are likely to have inadequate record).

Here, Petitioners argued below that "Washington state law supported objectors' position." App. Br., 21, 24. Petitioners cited and discussed Washington cases, *id.*, 34-35 and n. 16, contending "that there is no significant difference" between Washington state law and "Ninth Circuit fee jurisprudence." *Id.* Now the Petitioners contend the Ninth Circuit was wrong, Pet., pp. 21-28, while ignoring Washington law entirely.

Petitioners also quibbled over the district court's procedures, saying it should have appointed an expert (App. Br., 37-38), and it should have allowed further oral argument (*id.*, 38-39). They basically quarreled with those procedures and the district court's "weighing" of the facts in determining the fee award (*id.*, 26).

None of these arguments in the court of appeals are in the Petition; indeed, some are even contradicted in the Petition.[3] Because the Petition consists of arguments that were not made in the court of appeals, it should be denied.

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[3] In the court of appeals, for example, Petitioners argued that risk *is* an appropriate factor to increase the fee, App. Br. 29-31, 37-39, while they argued for a lower *weight* to that risk, *e.g.*, *id.*, p. 43. Here, Petitioners deny risk is a factor at all and they maintain that risk should be totally disregarded. Pet., pp. 9-21.

II. BECAUSE THE ONLY QUESTIONS RELATE TO ALLEGED ABUSES OF DISCRETION BY THE DISTRICT COURT IN ITS APPLICATION OF THE COMMON FUND FEE STANDARD IN WASHINGTON STATE LAW, CERTIORARI SHOULD BE DENIED.

This Court reviews cases "only for compelling reasons," when they involve "an important question of federal law." Sup. Ct. Rule 10. This case, however, involves only the district court's exercise of discretion based on the specific facts of a case, in a matter governed by Washington state law.

Petitioners' argument below was that "[t]he district court abused its discretion in calculating class counsel's attorneys' fee award." App. Br. 26 (Argument I, main heading). Petitioners argued that the district court's analysis was not "careful" enough and it failed to properly "weigh" both factors for and against the fee request. App. Br. 26. Petitioners argued that "*all* circumstances of the case" must be considered. App. Br. 30 (emphasis in orig.). Within this very general framework, Petitioners argued about various *factual* details regarding the pertinent factors in this case. App. Br. 30-31, 35-37, 39-40, 43.

Petitioners recognized below that the fee award is governed by Washington law. App. Br., 21, 24, 34-35. Petitioners made *no* argument in the court of appeals that risk should be disregarded entirely, as they now do in the Petition (pp. 9-10). They argued instead only that the risk should be evaluated differently (App. Br. pp. 29-31, 37-39). Petitioners even admitted in the district court that a multiplier of 2-4 for risk would be reasonable, CR 770, p. 51, and the district court's decision fell within that suggested range. Pet., p. A37.

Petitioners also argued numerous procedural quibbles concerning details of the "lodestar cross-check," *i.e.*, the district court's review of the relationship between the time required for this case and the amount of the requested fee. The purpose of the "cross-check" is to see whether there is some great disproportionality between the hours worked by class counsel and a percentage-based fee. The district court and court of appeals carefully reviewed the lodestar cross-check and found no such disproportionality here. Pet., pp. A12-A14, A34-A37.

Fee issues are within the district court's discretion. *Hensley v. Eckerhart*, 451 U.S. 424, 437-38 (1983). As discretionary fact-based matters, they are very far from federal law issues of "national importance." Sup. Ct. Rule 10. The petition should be denied.

III. THE COURTS BELOW DID NOT ABUSE THEIR DISCRETION.

The district court and court of appeals did not abuse their discretion. They applied the correct standard for common fund fee awards under Washington law. The district court entered detailed findings (Pet., pp. A28-A37), and the court of appeals carefully reviewed those findings (Pet., pp. A4-A15). The district court conducted a lodestar cross-check of the percentage fee. Pet., pp. A34-A39. The court of appeals not only reviewed the district court's lodestar cross-check, Pet., pp. A12-A14, but it also conducted an independent review of the percentage fee, Pet., pp. A4-A11, A16-A24. The issues raised by Petitioners in the district court and the court of appeals were basically factual in nature, but Petitioners submitted no evidence to

prove their arguments. Accordingly, there was no abuse of discretion.

CONCLUSION

The petition for certiorari should be denied.

DATED: October 10, 2002.

Respectfully submitted,

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Supreme Court, US
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No. 02-252

In The
Supreme Court of the United States

DONNA VIZCAINO and LESLEY STUART,
in their individual capacity,

Petitioners,

vs.

JON R. WAITE, et al.,

Respondents.

BENDICH, STOBAUGH & STRONG, P.C., Class Counsel,

Real-Party-In-Interest.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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ARGUMENT

I. THIS CASE PRESENTS ISSUES OF FEDERAL FEE JURISPRUDENCE.

Petitioners ask this Court to rule on issues of class action attorneys' fee award jurisprudence which involve federal law and federal judicial policy. Respondents argue that petitioners do not cite or discuss a single Washington State case. However, Petitioners, the Washington State Federal District Court, and the Ninth Circuit Court of Appeals all recognized that Washington State has adopted federal law with regard to the awarding of reasonable attorneys' fees from class action common fund settlements. Indeed, save *Bowles v. Department of Retirement Sys.*, 121 Wn.2d 52, 842 P.2d 440 (1993) – which announces Washington State's intention to follow federal law – every case cited by the federal district court and the Ninth Circuit is a federal case.

Respondents' assertion that "[Petitioners] never argued that federal law could or should override Washington law" is misleading. Everyone involved in this fee litigation understood that Washington State had adopted federal fee jurisprudence as its fee jurisprudence for awarding reasonable attorneys' fees from a class action common fund settlement.

As the Ninth Circuit stated:

> The district court [in applying Washington State law] followed the Ninth Circuit practice of looking to federal law for guidance in this area, and we will do the same.

Pet. App. 5.

The *Bowles* case was decided before the Ninth Circuit decision in *In re Washington Public Power Supply Sys. Sec. Litig. (WPPSS)*, 19 F.3d 1291 (9th Cir. 1994), and therefore did not contemplate and had no opportunity to address the question of whether *WPPSS's* rejection of *City of Burlington v. Dague*, 505 U.S. 557 (1992), in a common fund context, was appropriate. Petitioners believe that the Ninth Circuit decision in *WPPSS* was incorrectly decided as a matter of federal law, in light of this Court's decision in *City of Burlington v. Dague*.

It must be emphasized that the "standards of Washington State law" are federal fee jurisprudence and that Petitioners raised the risk multiplier issue before both courts. The district court stated:

> The applicability of the sixth and tenth factors may be in doubt. *See City of Burlington v. Dague*. . . . (Pet. App. 37 n.2),

and the Ninth Circuit stated:

> The bar against risk multipliers in statutory fee cases does not apply to common fund cases. *WPPSS*. . . . (Pet. App. at 13).

Furthermore, petitioners do not raise an issue of judicial discretion but one of law, asking this Court to determine whether its ruling in *City of Burlington v. Dague, supra,* applies when calculating a reasonable attorneys' fee in a common fund context. This is an issue over which the Circuits disagree.

Petitioners' lodestar cross-check issue is not a "procedural quibble[s]." It directly addresses the district court's use of a risk multiplier to nearly *quadruple* class counsel's

attorneys' fee award – a factor prohibited by this Court's decision in *Dague, supra*.

II. ERISA IS RELEVANT.

Petitioners believe that ERISA is relevant to this Court's consideration of the issues raised in their Petition. As Respondents note:

> Defendant Microsoft removed the case to federal court because it included . . . claims within ERISA.

Resp't Opp'n at 1.

While plaintiffs prevailed on their state claims, the dismissal of their ERISA claims was on appeal at the time of the settlement, and the settlement agreement included the class's state law claims *and* federal ERISA claims. Whether class counsel and the district and appellate courts could disregard the ERISA fee-shifting statute (and thereby obviate this Court's decision in *Dague, supra*), in seeking an award for reasonable attorneys' fees from the common fund, is also an issue which petitioners have asked this Court to decide.

Class counsel noted this issue in their Second Brief on Fees:

> Objector counsel, Mr. Schonbrun, makes a vague argument that ERISA fee-shifting principles might apply here even though the Settlement Fund is based on the class members' winning state law (ESPP) claim. . . . Percentage fees, however, are also reasonable in settlements involving claims under ERISA.

Class Counsel's Second Brief on Fees, filed 3/20/01, at 4 n.4; *see also* Appellants' Excerpts of Record at 33.

Petitioners have asked this Court to rule on whether a lodestar cross-check of a percentage fee award can disregard *Dague, supra's,* risk multiplier prohibition in class actions which settle federal claims brought under a federal fee-shifting statute as well as state law claims. When class counsel seek reasonable attorneys' fees as a percentage of a common fund recovery, and the district court performs a lodestar cross-check, is a risk multiplier a permissible factor to consider as a part of the fee calculation?

CONCLUSION

This Petition raises issues of national importance with regard to federal fee jurisprudence in the awarding of reasonable attorneys' fees in class actions, and Petitioners respectfully request that their Petition for Certiorari be granted.

Respectfully submitted,

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